

**Forced displacement in the Palestinian-Israeli conflict,
international law and transitional justice**

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School of Law

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Forced Displacement in the Palestinian-Israeli Conflict, International Law and Transitional Justice

MUNIR NUSEIBAH

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ABSTRACT

Sixty five years after the forced exodus of the majority of the Palestinian population that inhabited the territory on which Israel was established (known as *Nakba*, translated to catastrophe), forced displacement is still an important feature of the Israeli policies towards Palestinians. Not only does Israel prevent the return of refugees, but it is still inflicting more displacements through measures that have been undertaken within the framework of the Israeli legal system whether in its civil or military varieties. Unfortunately, despite the fact that a peace process has been launched since almost 20 years, Palestinian refugees and internally displaced persons have not been provided with remedies. On the one hand, the Israeli legal system is part of the problem, and on the other hand, the political process is not yet leading anywhere.

Against this background, scholars and other contributors have been debating solutions that could end the plight of the refugees within the context of the peace process. A new approach has emerged, attempting to use the transitional justice framework in solving the plight of the *Nakba* victims. Most of the new literature looks into the possibility of designing truth commissions to heal the pains caused by the *Nakba*.

This thesis aims at defining the parameters of a transitional justice approach in relation to displacement in Palestine/ Israel. It does so by attempting to employ a transitional justice methodology, which stresses the significance of comprehensiveness. Towards this end, the thesis starts by studying the measures that Israel took to inflict displacements during times of war and peace. Then, the legality of these measures in international law is examined. Finally, the thesis looks into transitional justice mechanisms and how they redressed forced displacement in similar contexts. As a result of this study, the thesis concludes that using transitional justice in the Palestinian-Israeli context cannot be limited to truth and reconciliation commissions, but needs also to comprehensively address the human rights violations by advancing such rights. This requires a number of remedies that must include, at a first step, the immediate end of the forced displacement regime. This can only happen through deep reforms in Israel's legal frameworks and state institutions. In addition, this shall be coupled with reparation programs including truth, return, restitution of property, compensation; as well as designing a policy concerning the criminal justice element of the crime of forced displacement.

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Declaration

I declare that all the material contained in this thesis is my own work.

Munir Nuseibah

List of abbreviations

CAVR	Commission for Reception, Truth, and Reconciliation (abbreviation derived from the Portuguese original name Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste)
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
DOP	Declaration of Principles on Interim Self Government
ECHR	European Court of Human Rights
GCIV	Fourth Geneva Convention
HRC	Human Rights Council
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally Displaced Person
IHL	International Humanitarian Law
ILC	International Law Commission
IMT	International Military Tribunal
Mol	Israeli Ministry of Interior
OPT	Occupied Palestinian Territory

PCIJ	Permanent Court of International Justice
PLO	Palestine Liberation Organization
RRC	Reparation and Rehabilitation Committee
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNSCOP	United Nations Special Committee on Palestine
WWI	First World War
WWII	Second World War

Chapter 1- Introduction

1.1 Brief Research Project Introduction

By the end of 2011, some 66 percent of the whole Palestinian population was displaced as a result of Israeli policies of forced displacement.¹ Since its creation, Israel has used its superior military power and its legal system to change the demography of areas it controlled in Mandatory Palestine to secure a Jewish majority and to change the demographic fabric of areas under its rule.²

Recent historical research based on declassified Israeli archives³ has demonstrated that the concept of “transfer,” a euphemism of forced displacement, has been deeply rooted in the mainstream leadership’s political strategies since before the establishment of the state.⁴ The practice of this displacement took place in times of war and calm, and no remedies have been provided, thus far, to the victims.

This doctoral research project focuses on the displacement of Palestinian groups and individuals throughout the history of the conflict, its legality and its remedies within the transitional justice framework. It will start by analyzing Israel's policies that depopulate the Palestinians from Palestine/Israel and examine the legality of those acts. Then, remedies for the illegal acts will be studied, learning from other conflicts that utilized the transitional justice framework in other parts of the world.

The selection of this project is justified by the following gaps in the collective knowledge of academics and practitioners (including human rights organizations,

¹ Badil, Resource Center for Palestinian Residency and Refugee Rights, *Survey of Palestinian Refugees and Internally Displaced Persons 2010-2012* (Beithlehem: BADIL, 2012), xvii.

² This will be discussed in Chapters 2 and 3.

³ The declassification of some Israeli official archives in the late 1980s opened the gate for a number of historians to review them and reveal plenty of facts that had been partly known but consistently denied by Israel. See, A. Shlaim, “The Debate About 1948,” *International Journal of Middle East Studies* 27, no. 3 (1995): 302.

⁴ Nur Masalha, *A Land Without a People: Israel, Transfer, and the Palestinians, 1949-96* (Faber and Faber, 1997), ix; Nur Masalha, *Expulsion of the Palestinians: The Concept of “Transfer” in Zionist Political Thought 1882-1948* (Washington: Institute for Palestine Studies, 1992); Israel Shahak, “A History of the Concept of ‘Transfer’ in Zionism,” *Journal of Palestine Studies* 18, no. 3 (1989): pp. 22–37.

negotiators, and other relevant contributors or users of knowledge) concerning displaced persons in Palestine/ Israel. The first and most important one is the scarcity of methodologically rigorous research projects that use the transitional justice framework to find remedies that look at the Palestinian-Israeli conflict, the anticipated political solutions, and the destiny of millions of displaced Palestinians. Most of the studies, as will be shown in the literature review below,⁵ focus on demonstrating the illegality of different displacement activities and calling on stopping the contemporary acts and reversing the older ones. While this kind of work is extremely important, there continues to be a serious gap with what our knowledge needs to be in a transitional phase from conflict to post-conflict situation.

Another gap in knowledge that will also be further identified in the literature review below is the scarcity of comparative studies that draw from lessons learnt from other conflicts with similar problems. This study aims at exploring a wide range of remedies, learning from the experiences of other conflicts.

A third gap in knowledge is the scarcity of studies that examine the problem of displacement as a whole and attempt to find fundamental solutions that see the macro picture, rather than one specific incident or pattern. Legal academics and practitioners have consistently chosen to review the different waves of displacement separately. One would find a lot of literature on the Palestinian refugees of the 1948 war, a number on the 1967 war refugees and a number of separate studies on each of the contemporary displacement activities. While this is certainly justified by the authors and defenders' need to focus on a certain violation, it seems important to start looking into the macro picture of displacement, especially when time will come for justice options to be put into practice. This thesis will present a comprehensive approach in studying the displacement methods within its scope, in an endeavour to tackle the roots and the symptoms of the issue simultaneously.

In light of the gaps in knowledge briefly presented above, this study will examine the potential of a transitional justice framework in remedying the Palestinian

⁵ See Section 1.3 below.

displacements. There are only a few over a handful of publications that consider transitional justice mechanisms, and in many cases these publications focus on truth and reconciliation and ignore other mechanisms that are normally used like repatriation, restitution, compensation legal and institutional reform and accountability for the perpetrators of the crime of forced displacement. Hence, this thesis will present its major contribution to knowledge by examining the displacement problem and its remedies within the transitional justice framework comprehensively and by defining the parameters that would govern using this framework to redress the victims of forced displacement. The comprehensiveness that this thesis will seek includes two elements: First, the factual examination of the problem of forced displacement will seek a wide scope of policies and events; and second, the remedies that will be examined include the whole range of redress measures affiliated with the transitional justice framework.

As will be shown below, the major goal of this study and its main contribution to knowledge is to define the parameters of a transitional justice approach to redressing the victims of forced displacement in the context of the Palestinian-Israeli conflict.

The main research question for this project is: *What are the parameters, suggested by the transitional justice theory and international practice, which would govern a process of transitional justice aiming at redressing the victims of Israeli forced displacement?*

1.2 Historical Background: Forced Displacement in the Palestinian-Israeli Conflict

The idea of creating a Jewish state in Palestine came into being around the end of the 19th century as an attempted answer to the increasingly rising anti-Semitism in Europe and other places in the world.⁶ Although Jews were only a small minority of the Palestinian community then,⁷ those who adopted the idea of creating a Jewish state

⁶ John Quigley, *Palestine and Israel: A Challenge to Justice* (Duke University Press, 1990), 3–13.

⁷ A census conducted by the British indicated that in 1922 the percentage of Jews in the total Palestinian population was only 12.91%. See, Anglo-American Committee of Inquiry on Jewish Problems in Palestine and Europe, *A Survey of Palestine, Prepared in December 1945 and January 1946 for the Information of the Anglo-American Committee of Inquiry* (Washington: Institute for Palestine Studies, 1991), 142.

created a movement called “Zionism” that aimed at colonizing Palestine with Jews in order to create a “Jewish state.”⁸

Palestine was occupied by the United Kingdom during the hostilities of the First World War, and later put under its mandate.⁹ Although Jews were a small minority in Palestine then, the United Kingdom still decided to adopt the Zionist Movement's goal, and therefore, helped to invite Jewish settlers and build Jewish towns.¹⁰ However, until the time its mandate ended in 1948, Jews were only 33% of the population of Palestine.¹¹

One year before the end of the Mandate, the United Nations General Assembly recommended dividing Palestine into two states: one Jewish and one Arab. However, according to this plan, the Jewish state which would be built on 54% of Palestine would have an enormous Arab minority of 45% of the population.¹² Following this resolution, hostilities started between several armed Zionist militias and local Palestinians.¹³ As a result of these hostilities, over 250,000 Palestinians were displaced by the Zionist militias by the time United Kingdom ended its mandate in May 15th 1948.¹⁴ Upon the end of the mandate, the leadership of the Zionist movement announced the establishment of the state of Israel.¹⁵ Then neighbouring Arab states sent troops that participated in the war that ended in 1949, with Israel establishing itself on 78% of the total land of Palestine. By

⁸ Quigley, *Palestine and Israel*, 10.

⁹ United Nations Special Committee on Palestine, *United Nations Special Committee on Palestine, Report to the General Assembly* (UN General Assembly, September 3, 1947), para. 68, A/364, Official Records of the Second Session of the General Assembly, <http://unispal.un.org/UNISPAL.NSF/0/07175DE9FA2DE563852568D3006E10F3>.

¹⁰ Henry Cattán, *Palestine and International Law: The Legal Aspects of the Arab-Israeli Conflict*, vol. Second (London: Longman, 1973), 15–19.

¹¹ United Nations Special Committee on Palestine, *United Nations Special Committee on Palestine, Report to the General Assembly*, para. 13–4; Cattán, *Palestine and International Law: The Legal Aspects of the Arab-Israeli Conflict*, Second:15–19.

¹² UN General Assembly, “Resolution 181 (II) Future Government of Palestine,” November 21, 1947.

¹³ Benny Morris, *The Birth of the Palestinian Refugee Problem Revisited*, 2nd ed. (Cambridge University Press, 2004), 13; Ilan Pappé, *The Ethnic Cleansing of Palestine* (Oxford Oneworld, 2007), 51; Rashid Khalidi, “The Palestinians and 1948: The Underlying Causes of Failure,” in *The War for Palestine: Rewriting the History of 1948*, ed. Eugene L. Rogan and Avi Shlaim, 2nd ed. (Cambridge University Press, 2007), 13.

¹⁴ Pappé, *The Ethnic Cleansing of Palestine*, 40.

¹⁵ “Declaration of Establishment of State of Israel,” May 14, 1948, Published in the Official Gazette, No. 1 of the 5th, Iyar, 5708 (14th May, 1948)., <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm>.

that time, around 700,000-900,000 Palestinians, who constituted around 80% of the Palestinian population in the newborn state, were displaced, and became known as the “Palestine Refugees” or the “Palestinian Refugees.”¹⁶ This incident has been referred to by Palestinians as the “*Nakba*,” the Arabic word for catastrophe.

After the war ended, Israel continued to exercise a policy called “transfer” which aimed at further decreasing the number of Palestinians living on its territories by inflicting forced displacement upon them.¹⁷

In 1967, a war erupted between Israel and a number of its neighbouring countries, which resulted in Israel occupying vast territories that included the rest of Palestine, the West Bank and Gaza Strip, that constituted 22% of the total area of mandatory Palestine. Israel won the war in 6 days, and then started to exercise a policy of forced displacement in the occupied Palestinian territory (hereinafter OPT).¹⁸ The “transfer” policy that started during the 1947-1949 war (known as the 1948 war), has not ended yet, and has been exercised in several forms, such as military operations, the denial of citizenship and the revocation of residencies.¹⁹ The legal regimes which Israel implements in its sovereign territory and the Occupied Palestinian Territory (hereinafter OPT) have played a major role in inflicting the continuous displacement of Palestinians.²⁰

Although a Palestinian-Israeli peace process has been ongoing since 1993,²¹ no final status agreement has been reached yet, and the ‘transfer’ policy continues to be

¹⁶ Morris asserts that the number of refugees has been disputed, and estimates that it would be around 700,000 Palestinians. Morris, *The Birth of the Palestinian Refugee Problem Revisited*; The United Nations Conciliation Commission for Palestine estimated the number of refugees displaced by the war as between 800,000 and 900,000. United Nations Conciliation Commission for Palestine, “Historical Survey of Efforts of the United Nations Conciliation Commission for Palestine to Secure the Implementation of Paragraph 11 of the General Assembly Resolution 194(III): Question of Compensation (Working Paper Prepared by the Secretariat),” October 2, 1961, U.N. Doc. A/AC.25/W/81/Rev.2, <http://domino.un.org/UNISPAL.NSF/0/3e61557f8de6781a052565910073e819?OpenDocument> There are many other estimates provided by the parties to the conflict, academics, and many other contributors, but the real number of refugees is not the focus of this thesis.

¹⁷ Masalha, *A Land Without a People: Israel, Transfer, and the Palestinians, 1949-96*, ix.

¹⁸ Ibid.

¹⁹ These policies will be examined thoroughly in Chapters 2 and 3.

²⁰ An analysis of these policies will be presented in Chapters 2 and 3.

²¹ Israel and Palestine Liberation Organization, “Declaration of Principles on Interim Self-Government Arrangements” (Signed in Washington DC, September 1993).

exercised on a daily basis.²² As will be shown in the literature review below, several studies have been conducted to shed light on policies and actions that resulted in these displacements, mainly focusing on documenting the policies and actions, and examining their legality in international law standards. However, there has been scarce work on how to deal with this issue once the conflict is over. This has created an important gap in knowledge that this study aims to bridge.

1.3 Literature Review

Displacement in the context of the Palestinian-Israeli conflict has been examined by several Palestinian, Israeli, and international scholars and human rights organizations. This has been done mostly by focusing on a certain event, incident, or pattern as opposed to forced displacement as a consistent policy within Israel that is exercised both in times of war and peace, and both in Israel and the Occupied Palestinian Territory (hereinafter OPT). This section will review the relevant literature and work presented by human rights organizations and practitioners, as well as academics. Because of the nature of this topic, it is of high importance to closely look at the work of relevant contributors whether they were academics from all disciplines, or human rights advocates working on three disciplines: The fact analysis of the policies of forced displacement; the international law analysis that examines their legality; and finally the work on remedies that should be available to the victims.

Before reviewing the legal work presented, it is important to review the new historical research on which part of the factual foundation of this work is based. The factual analysis in this thesis is partly based on the work of Israeli and Palestinian historians who have used their relatively recent access to formal Israeli documents to draw the link between incidents of displacement and an Israeli intention to change the demographic balance by the forcible displacement of Palestinians.

The literature review will be divided into three parts: the first discussing the work done to collect and analyze facts and information about the displacement of the

²² The position of refugees and internally displaced persons within the Palestinian-Israeli peace process will be discussed further in Chapter 5.

Palestinians, whether during old or recent waves of displacement. The second will shed light on the work on the legality of Israel's displacement policies. Finally, the third part will explain the work on remedies, and show the gaps in research on this topic.

1.3.1 First: Research on Facts and Data

The displacement of Palestinians has been documented and reported in different ways, depending on the historical period in which it took place. The Palestinian exodus of 1948 happened when Human Rights organizations had no clear presence or activity in the region, and therefore the details of what took place was mainly known through the oral history that was documented during and after the *Nakba*, and from reports of the United Nations and the states neighbouring Palestine/Israel. Information between then and slightly after 1967 is provided mainly by the work of scholars who have researched archives, oral testimonies and other sources.

The more recent displacement activities, the ones that are still continuous, have taken place in an atmosphere of an active Palestinian, Israeli and international civil society. Therefore, the information about the contemporary displacement can be found in the reports of human rights organizations, Supreme Court petitions and other similar sources of information.

1.3.1.1 The 1948 Exodus and Israel's Responsibility

Israel has consistently maintained a position, according to which it was not responsible for the exodus of the Palestinians from their homes in the 1948 war neither legally nor morally.²³ However, from an early stage, Palestinian historians like Arif Al- Arif in his book about Al-Nakba (*The Disaster: The Disaster of Jerusalem and the Lost Paradise 1947-52*) mentioned that:

Whoever thinks that Palestine's Arabs exodus from their homes was merely a result of the conditions and incidents that took place following the Partition resolution in 29 November 1947 is wrong. The truth is that it was an inevitable result of a plan, designed by those calling for a Jewish National Home, and whoever supported them in the west. They started designing the plan at the

²³ Pappe, *The Ethnic Cleansing of Palestine*, 71–7.

beginning of the twentieth century, when they started to say: 'Palestine is a land without a people! It should be given to a people without a land.'²⁴

Al-Arif reached this conclusion while he did not have access to Israeli documents. It was not until the late 1980s, when Israel allowed access to part of its official archives for researchers, that Israeli evidence was found concerning the Palestinian narrative of the exodus.²⁵

A pioneer in this research was Benny Morris, who wrote his first book in 1988,²⁶ exposing facts that revealed that the majority of the Palestinians who were displaced in the war were forcibly displaced. In his more recent book *The Birth of the Palestinian Refugee Problem Revisited* he maintained that "the displacement of Arabs from Palestine or the areas of Palestine that would become the Jewish State was inherent in the Zionist ideology and, in microcosm, in Zionist praxis from the state of the enterprise."²⁷ However, he also argued that "there was no pre-war Zionist plan to expel 'the Arabs' from Palestine or the areas of the emergent Jewish State."²⁸ In spite of that, his conclusion still included that there was no clear consistent pre-war plan to expel the Palestinians. He argued: "Haganah and IDF units acted inconsistently, most units driving out Arab Communities as a matter of course while others left... villages and townspeople in place."²⁹ But in conclusion he argued that

If a measure of ambivalence and confusion attended Haganah/ IDF treatment of Arab communities during and immediately after conquest, there was nothing ambiguous about Israeli policy, from summer 1948, toward those who had been displaced and had become refugee and toward those who were yet to be displaced, in further operations: Generally applied with resolution and, often, with brutality, the policy was to prevent a refugee return at all costs. And if, somehow, refugees succeeded in infiltrating back they were routinely rounded up and

²⁴ Arif Al-Arif, *Al-Nakbah, Nakbat Bayt Al-Maqdis wal-Firdaus Al-Mafquous Al-Mafqood 1947-52* (*The Disaster: The Disaster of Jerusalem and the Lost Paradise 1947-52*), vol. 1st (Jerusalem: Al-Maktabah Al-Asirah, 1956), 1057, (Own Translation from Arabic).

²⁵ The declassification of some Israeli official archives in the late 1980s opened the gate for a number of historians to review them and reveal plenty of facts that had been partly known but consistently denied by Israel. See, Shlaim, "The Debate About 1948," 302.

²⁶ Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947-1949*, vol. 1st (Cambridge: Cambridge University Press, 1987).

²⁷ Morris, *The Birth of the Palestinian Refugee Problem Revisited*, 588.

²⁸ Ibid.

²⁹ Ibid.

expelled... In this sense, it may fairly be said that all 700,000 or so who ended up as refugees were compulsorily displaced or 'expelled'.³⁰

Hence, even though Morris denies that Israel worked according to a clear plan to displace this number of Palestinians, he still believes that Israel is responsible for not allowing all those refugees to return once the war was over.

Ilan Pappé agreed with Morris on the fact that Israel forcibly displaced the majority of the Palestinian population in the areas it controlled during and after the 1948 war. However, he also found that this took place according to a plan designed prior to the war, called "Plan *Dalet*."³¹ Pappé also disagreed with Morris's methodology, depending solely on Israeli military archives, which are not all exposed yet to the readers and which also did not include the whole story.³² Pappé agreed with the Palestinian sources that the Zionists started their transfer policy even before the British mandate ended in 1948, and had already transferred quarter a million Palestinians by May 15th of that year, the date in which the mandate ended.³³

Nur Masalha did extensive work on the concept of Transfer in the Zionist ideology and practice between the years 1882 and 1996 in two separate books. In his first book, (*Expulsion of the Palestinians, The Concept of "Transfer" in Zionist Political Thought, 1882-1948*) he researched piles of files from the Israeli archives, looking at the details of the Zionist movement's goals from the time of the founder of political Zionism, Theodore Hertzl, until the establishment of the state in 1948.³⁴ He quoted letters, speeches, conference and meeting minutes, and other official documents in which he found consistent evidence that not only did transfer have an ideological background in Zionism, but that there was a consensus among the Zionist leaders (left and right wing) to exercise such a transfer. Indeed, the exodus of the Nakba was a direct result of this movement.

In Masalha's words, he concluded:

³⁰ Ibid., 589.

³¹ Pappé, *The Ethnic Cleansing of Palestine*, 28.

³² Ibid., xv.

³³ Ibid.

³⁴ Masalha, *Expulsion of the Palestinians: The Concept of "Transfer" in Zionist Political Thought 1882-1948*.

[t]he notion of transfer was born almost at the same time as political Zionism itself, with Herzl's hope to 'spirit the penniless population across the border.' The desire to have a native population was a constant in Zionist thought, but it was tempered with a great deal of pragmatism on the part of the Zionist leadership and even at times of considerable scepticism as to its practicability.³⁵

Given this ideological background that fuelled the will to displace as many Palestinians as possible, Masalha argued that "the evacuation of the great majority of the Palestinian population in 1948 took place against the background of war and military campaigns; it was a time during which opportunities... were not missed."³⁶

He, as Pappé did, disagreed with Morris that the Zionist leadership had no pre-war plan to transfer the native population of Palestine.³⁷ Masalha argued that

The fact that no written blanket orders unambiguously calling for the wholesale expulsion of the Arab population have been found has been cited as indicating the absence of premeditated design; in similar vein, the inconsistencies in the behaviours of the various field commanders are given as proof that the exodus was born of the exigencies of war. But the exodus was not the less the result of painstaking planning and an unswerving vision... The exodus is nothing if not testimony to the endurance of a vision that runs in an unbroken line from the early days of Zionist colonization to this day.³⁸

In his second book, Masalha presented important details about the period that followed the 1948 exodus, demonstrating that the concept of "transfer" continued to be a practice in the state of Israel driven by its ideology, and showed that Israel's main stream leaders planned other transfers that took place between 1949 and 1996.³⁹ He argued that Israel continued to design transfer plans during the fifties, the period during which it ruled its Palestinian minority with a military government, and that the idea of transfer revived after the occupation of 1967 when Israel suddenly found itself ruling another big number of Palestinians.⁴⁰

³⁵ Ibid., 207.

³⁶ Ibid., 208.

³⁷ Nur Masalha, "A Critique on Benny Morris," in *The Israel-Palestine Question: Rewriting Histories*, ed. Ilan Pappé, 2nd ed. (Routledge, 2009), 184–191.

³⁸ Masalha, *Expulsion of the Palestinians: The Concept of "Transfer" in Zionist Political Thought 1882-1948*, 209.

³⁹ Masalha, *A Land Without a People: Israel, Transfer, and the Palestinians, 1949-96*.

⁴⁰ Ibid., 1–60.

These findings have multi-fold significance. First, they demonstrate that the displacement of Palestinians in this conflict was not only desired by Israel, but also inflicted through designed policies. They serve in the factual examination of the incidents that led to the different displacements, especially in a period during which there was not an active civil society documenting and reporting international law's violations. Secondly, they demonstrate the ideological framework that leads the Israeli institutions to act the way they do today towards the Palestinian population it controls. Finally, the findings can serve in the remedy finding process as basis for the truth element in a post-conflict transitional justice process.

1.3.1.2 Contemporary Displacements

Unlike the displacements that happened in the earlier stages of the conflict, data on contemporary displacement is easier to find. This is due to the large number of Israeli, Palestinian and international organizations that work daily to document Israel's violation of international law, especially human rights and international humanitarian law. These organizations normally write periodical reports or other publications to spread universal awareness about the violations and advocate ending them. Some organizations challenge one or more of Israel's actions in its own courts, trying to change its policies by creating precedents.

Organizations working in Palestine/ Israel have identified several ways of forced displacement, including direct or indirect methods used by the state to change the demographic structure of certain areas.

Al-Haq, a human rights organization based in Ramallah, keeps a record of human rights violations documented by its own field workers.⁴¹ It has issued a few reports documenting and examining the legality of specific population transfer actions taken by Israel. Since Al-Haq's mandate is the Occupied Palestinian Territory, it has not worked on the areas beyond that territory. It issued reports, including one about the villages near the Latroun area ('Imwas, Yalu, and Beit Nouba), describing the demolition of the villages in

⁴¹ "About Al-Haq," *Al-Haq- Defending Human Rights in Palestine Since 1979*, accessed April 18, 2013, <http://www.alhaq.org/about-al-haq/about-al-haq>.

1967 and examining the legality of the action.⁴² This is an example of Israel's direct military forced displacement that took place during the war.⁴³

Al-Haq also published a report about forcible displacements during the second intifada, focusing on the deportation of 39 persons in 2002 in the aftermath of the military incursions in the West Bank following an agreement held with the chairman of the Palestinian Authority at that time to end the siege that Israel held on the Church of the Nativity in Bethlehem.⁴⁴ The report examined the deportations and the agreement, and also concluded that they were illegal in international law.⁴⁵

Other organizations have also published on the direct displacements. B'tselem, an Israeli organization working on the human rights violations in the occupied territories has documented a few incidents of forced displacement of Palestinians in the occupied territory. B'Tselem published a report in 1993 documenting and examining the legality of Israel's deportations of Palestinians from the occupied territory, focusing on the deportation of 415 Palestinians in 1992.⁴⁶ In 2000, B'Tselem raised the issue of the expulsion of some 700 Palestinians from Southern Mount Hebron area in a case study report.⁴⁷

In addition to their work on direct deportations and transfers, human rights organizations have been monitoring, documenting and reporting ways in which Israel has been de-populating certain areas in Israel and the Occupied Palestinian territory using regulatory measures. These organizations also issued case studies, reports and other publications to expose these policies.

An example is Al-Haq's case study on Al-Numan Village, which argues that the village is facing an, in Al-Haq's words, "indirect transfer" taking place as a result of

⁴² John Reynolds and Al-Haq, *Where Villages Stood: Israel's Continuing Violations of International Law in Occupied Latroun, 1967-2007* (Ramallah, Palestine: Al-Haq, 2007).

⁴³ Ibid., 9–10.

⁴⁴ Kate Coakley and Marko Oberg, *Israel's Deportations and Forcible Transfers of Palestinians Out of the West Bank During the Second Intifada* (Ramallah, Palestine: Al-Haq, 2006), 5–8.

⁴⁵ Ibid., 1–50.

⁴⁶ Tami Bash, Yuval Ginbar, and Eitan Felner, *Deportation of Palestinians from the Occupied Territories and the Mass Deportation of December 1992* (Jerusalem: B'Tselem, 1993).

⁴⁷ Yael Stein, *Expulsion of Palestinian Residents from the South of Mt. Hebron Area* (Jerusalem: B'Tselem, 2000).

“hardships imposed on the population” which are, according to the report, “concerted and deliberate policy on the part of Israel to force the villagers to leave.”⁴⁸ In this report, Al-Haq also used data it collected about the hardships the village goes through and concluded that the Israeli authorities aimed at displacing the Palestinian population living in that village.⁴⁹

Similarly, B’Tselem has issued a report on the “isolation of Sheikh Sa’ad Village” in 2004, noting that very strict movement restrictions on this village have resulted in the displacement of at least one quarter of the residents of the village, a result that was described as “catastrophic” by B’Tselem.⁵⁰

Another kind of activity that has been widely reported by several organizations is the “Quiet Deportation,” as called by HaMoked and B’Tselem, referring to the revocation of residencies from Palestinians in Jerusalem and other areas.⁵¹ These two organizations, in addition to a few others including Al-Haq, Badil and Adalah have documented and challenged this policy. According to B’Tselem and HaMoked, Israel’s policy of residency revocation in Jerusalem aims at creating a “demographic balance” in East Jerusalem, by “maintaining a permanent and conclusive Jewish Majority in Jerusalem.”⁵² In addition to the residency revocation, B’Tselem and HaMoked argued that other policies like “restrictions on building in east Jerusalem, insufficient allocation of resources to the eastern part of the city, and the poor quality of municipal services provided there” were also means to achieve the same objective.⁵³

Similarly, Badil referred to the revocation of residency rights as a method of displacement, mentioning that only “by 1991, Israel had revoked residency rights of more

⁴⁸ Grazia Careccia and John Reynolds, *Al-Nu’man Village: A Case Study of Indirect Forcible Transfer* (Ramallah, Palestine: Al-Haq, 2006), 35.

⁴⁹ Careccia and Reynolds, *Al-Nu’man Village: A Case Study of Indirect Forcible Transfer*.

⁵⁰ Yehezkel Lein, *Facing the Abyss: The Isolation of Sheikh Sa’ad Village- Before and After the Separation Barrier* (Jerusalem: B’Tselem, 2004), 12.

⁵¹ HaMoked, B’Tselem, and Yael Stein, *The Quiet Deportation: Revocation of Residency of East Jerusalem Palestinians* (B’Tselem; HaMoked, 1997); HaMoked, B’Tselem, and Yael Stein, *The Quiet Deportation Continues: Revocation of Residency and Denial of Social Rights of East Jerusalem Residents* (B’Tselem, HaMoked, 1998).

⁵² HaMoked, B’Tselem, and Stein, *The Quiet Deportation Continues: Revocation of Residency and Denial of Social Rights of East Jerusalem Residents*, 4.

⁵³ *Ibid.*, 53.

than 10,000 Palestinians by administrative decision” in the occupied territory, and that Israel focused on revoking Jerusalem’s residents’ residency status following the peace agreement with the Palestinian Liberation Organization.⁵⁴

Another method of silent transfer used by the authorities is Israel’s restriction of family reunification both into Israel and the Occupied Palestinian Territory has been documented and challenged by Palestinian and Israeli human rights organizations. In 1991 B’Tselem published a report documenting the case of deporting women and children in the occupied Palestinian territory for not having acquired an approved family reunification permit from the military government in the territory.⁵⁵ In 1999 another report was issued by HaMoked and B’Tselem looking at the issue of family re-unification in a more general way, finding that tens of thousands of Palestinian residents of the Occupied Territory have not been able to live with their spouses in Palestine.⁵⁶ According to the report “the only way for these families to live together is by emigrating from the Occupied Territories.”⁵⁷ The report further concludes that:

Israel’s position is dictated by political considerations, whose objective is to change the demographics of the Occupied Territories by blocking immigration of spouses of residents of the Occupied Territories into the area and by encouraging emigration of divided Palestinian families. This political consideration also dictates Israel’s policy in other areas affecting Palestinian rights, including the “establishment of Israeli settlements, revocation of residency in the Occupied Territories, including East Jerusalem, and the internal creation of a housing shortage.”⁵⁸

These two organizations also issued a position paper in 2008 documenting Israel’s separation of families in the West Bank and Gaza Strip and “active measures to locate and forcibly remove Palestinians from the West Bank and to the Gaza Strip, based on the claim

⁵⁴ Badil, Resource Center for Palestinian Residency and Refugee Rights, *Survey of Palestinian Refugees and Internally Displaced Persons 2008-2009* (Beithlehem: BADIL, 2010), 23–4.

⁵⁵ B’Tselem, *Renewal of Deportation of Women and Children from the West Bank on Account of “Illegal Residency,”* Information Sheet (B’Tselem, October 1991).

⁵⁶ HaMoked and B’Tselem, *Families Torn Apart: Separation of Palestinian Families in the Occupied Territories* (Jerusalem: B’Tselem; HaMoked, 1999).

⁵⁷ *Ibid.*, 132.

⁵⁸ *Ibid.*

that they were 'illegal aliens' in the West Bank since their registered address was Gaza Strip and they did not have a 'permit to remain' in the West bank."⁵⁹

The same policy has been monitored in Israel and East Jerusalem, but by the introduction of a law that prevents family unification for people married to Palestinians that later expanded to those married from anyone from countries that Israel considers enemy states.⁶⁰ According to a report by B'Tselem and HaMoked, this policy has been introduced for demographic control reasons.⁶¹ The report mentions that the motivation behind this law is not the one that was presented officially by the state in the petition that was filed against it in the Israeli High Court of Justice, but that "the state [Israel] cited other reasons to justify the policy, including the danger to the Jewish character of the state resulting from family unification, and the claim that residents of the Occupied Territories exploit the family unification procedure to carry out a 'creeping right of return.'"⁶²

1.3.2 Work on Examining Legality of Israel's Forced Displacements

As shown above, Israel's transfers have been conducted in several ways and contexts since the beginning of the conflict. The displacement has taken the forms of a big scale of ethnic cleansing in the aftermath of a war as in the exodus of 1948 and partly in 1967, and continuous transfers by using law and/ or military orders.

There is not one study that takes the whole displacement policy and examines its legality in international law; however, a lot of work has been conducted by academics, human rights organizations and others to examine the legality of Israel's actions. Deeper legal analysis of the different policies will be demonstrated in Chapter 4 of this thesis. This section aims at scanning the most important work on legality presented by legal scholars

⁵⁹ HaMoked, center for the Defence of the Individual and B'Tselem, *Separated Entities: Israel Divides Palestinian Population of West Bank and Gaza Strip*, Position Paper (Jerusalem: HaMoked and B'Tselem, September 2008), 5, http://www.btselem.org/download/200809_separated_entities_eng.pdf.

⁶⁰ Israeli Knesset, *Nationality and Entry into Israel Law (Temporary provision)*, 2003, http://www.knesset.gov.il/laws/special/eng/citizenship_law.htm; Israeli Knesset, *Nationality and Entry into Israel Law (Temporary Order)(Amendment)*, 2005; Israeli Knesset, *Nationality and Entry into Israel Law (Temporary Order)(Amendment)*, 2007.

⁶¹ HaMoked, B'Tselem, and Yael Stein, *Forbidden Families: Family Unification and Child Registration in East Jerusalem* (B'Tselem; HaMoked, 2004), 5.

⁶² *Ibid.*, 17.

and human rights organizations, for the purpose of showing this study's links to existing work and identifying the gaps that justify the scope and objectives of this study.

The topic that got most of the attention of scholars has been the Palestinian refugees (also called Palestine refugees), in 1948. During the *Nakba* of 1948, while the forced displacements were still in process, the UN General Assembly called Israel to allow "the refugees wishing to return to their homes and live at peace with their neighbours" to return to their homes "at the earliest practicable date" and called Israel to pay compensation to those "choosing not to return."⁶³

Ever since UN resolution 194 was issued, plenty of literature has been dedicated to study the legality of Palestinians' displacement in 1948 and the suggested UN remedy, namely, the right to return. Several authors have found that the forced displacement of the majority of the Palestinian population during the 1948 war was illegal.⁶⁴ They based their findings on several bodies of international law, especially human rights law, international humanitarian law, refugee law and nationality law.⁶⁵

Although other displacements, which will be focused on in Chapter 3, have gotten less attention from international scholars, they have been worked on both by human rights organizations, and their legality has been examined.

The work of human rights organizations in Palestine/ Israel has mostly been based on three pillars: monitoring and documentation of human rights violations and examining their legality, reporting them to the world, and challenging them using the mechanisms available in the Israeli system.

The different activities designed for the expulsion of the Palestinian population, as briefly shown above, have been examined in international legal terms. As many of them

⁶³ UN General Assembly, "Resolution 194 (III)," 1948.

⁶⁴ Gail Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis* (Bethlehem, Palestine: Badil, 2001); John Quigley, "Displaced Palestinians and a Right of Return," *Harvard International Law Journal* 39, no. 1 (1998): 171–229; Victor Kattan, "The Nationality of Denationalized Palestinians," *Nordic Journal of International Law* 74 (2005): 67–102; W. Thomas Mallison and Sally V. Mallison, "The Right of Return," *Journal of Palestine Studies* 9, no. 3 (April 1, 1980): 125–136; Mutaz Qafisheh, "Bases for the Palestinian Refugees' Right of Return Under International Law: Beyond General Assembly Resolution 194," accessed November 26, 2012, <http://www.cjicl.org.uk/index.php/cjicl-blog/entry/bases-for-the-palestinian-refugees-right-of-return>.

⁶⁵ The aspects of the illegality of the Israeli forced displacement policies will be analyzed in Chapter

were found illegal, some of them were reported and challenged by one or more human rights organizations.

Al-Haq, Badil, B'Tselem, HaMoked, Adalah and other organizations have all contributed to the legal discussion. For example, the second smaller scale exodus of the three Latroun villages in 1967 was examined in Al-Haq's study, and was found illegal according to International Humanitarian and human rights laws.⁶⁶ Similarly, Al-Haq found that the deportation of the Church of the Nativity incident in 2002 was illegal in spite of the international agreement that took place prior to it.⁶⁷ It also reached the conclusion that this displacement violated international criminal law and constituted a war crime.⁶⁸

The contemporary displacement activities have also been studied by the numerous organizations mentioned above. Using International Humanitarian law, Human rights law and other international legal instruments these activities were found illegal. For example, the consequences caused by the strict movement restrictions were found a result of a violation of the principle of freedom of movement.⁶⁹

In Al-Nu'man village case, Al-Haq not only found the illegality of Israel's action in the hardships caused, but also argued that the Authorities were planning on indirectly transferring the population from the village. The main legal arguments brought forward by Al-Haq included violations of freedom of movement, access to education, property rights and family life.⁷⁰

The revocation of residencies has also been argued illegal by many organizations. B'Tselem and HaMoked saw that this revocation entails a discrimination policy between

⁶⁶ Reynolds and Al-Haq, *Where Villages Stood: Israel's Continuing Violations of International Law in Occupied Latroun, 1967-2007*, 41–70.

⁶⁷ Coakley and Oberg, *Israel's Deportations and Forcible Transfers of Palestinians Out of the West Bank During the Second Intifada*, 43–9.

⁶⁸ Ibid.

⁶⁹ Lein, *Facing the Abyss: The Isolation of Sheikh Sa'ad Village- Before and After the Separation Barrier*, 12.

⁷⁰ Careccia and Reynolds, *Al-Nu'man Village: A Case Study of Indirect Forcible Transfer*, 23–37.

Jews and Arabs in Jerusalem.⁷¹ The ban of family unification both in the OPT and Israel has also been found to be a violation of international law and a discriminatory policy.⁷²

As mentioned earlier, the legality of the incidents that are within the scope of this study will be examined in chapter 4. But for the purposes of the present review of literature, one can conclude that the existing literature studies displacement waves as separate events, not as a whole systematic policy of displacement and persecution based on national origin. As will be shown throughout the current study, a comprehensive approach to examining the policy of displacement as a whole can contribute also in the legal discourse, especially when it is found that displacement is systematic and widespread. It will be argued in Chapter 4 that any displacement within the context of a widespread policy of displacement is condemned as a crime against humanity. Hence, a comprehensive approach to examining the legality of policies since 1948 until today can make a significant contribution to the legal discussion.

1.3.3 The Remedy Discourse

Since the Nakba in 1948, Israel has consistently denied the right of the refugees and internally displaced persons to return to their homes. Furthermore, as will be explained in Chapter 3, Israel also continued to design more policies that inflict displacement. Unfortunately, despite the fact that a peace process has been ongoing for twenty years, the 1948 refugee issue has been postponed to the “final status” negotiations,⁷³ while Israel blocked any progress in relation to redressing those who were displaced in 1967 or whose residencies were revoked.⁷⁴ Moreover, Israel has maintained a

⁷¹ HaMoked, B'Tselem, and Stein, *The Quiet Deportation Continues: Revocation of Residency and Denial of Social Rights of East Jerusalem Residents*, 23.

⁷² HaMoked, B'Tselem, and Stein, *Forbidden Families: Family Unification and Child Registration in East Jerusalem*, 17.

⁷³ Arab Republic of Egypt and Israel, “The Camp David Accords- The Framework for Peace in the Middle East,” September 17, 1978, sec. A(1)(F), Full Text published in President Jimmy Carter’s Library, available at: <http://www.jimmycarterlibrary.gov/documents/campdavid/accords.phtml>; Israel and Jordan, “Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan” (Washington, DC, October 26, 1994); Israel and Palestine Liberation Organization, “Declaration Of Principles On Interim Self-Government Arrangements,” Article V(3); Israel and Palestine Liberation Organization, “Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip” (Washington, D.C., September 1995), Article XXXI.

⁷⁴ R. Brynen, “The Past as Prelude? Negotiating the Palestinian Refugee Issue,” *Chatham House Briefing Paper* (2008): 2,

position according to which it was not responsible for the displacement of the refugees and, as a result, has no obligation to allow them to return or enjoy other remedies.⁷⁵

Against this background, a number of schools of thought have emerged to suggest remedies based on a number of frameworks. The mass exodus that took place as a result of the 1948 Nakba received most of the attention of the contributors. The two major approaches that emerged in this discussion were a “realistic approach” and a “rights-based approach.” Let us review each of the two schools.

The “realistic approach” argued that since it is impossible that Israel will allow the return of the refugees to Israel, the Palestinians should be “realistic” about their demands and forfeit the right of the refugees to return to Israel. For example, Ziad Abu Zayyad argued in an article published in 1994 entitled “The Palestinian Right of Return: A Realistic Approach:”

[W]ith a realistic solution becoming more possible than ever, the Right of Return became a highly relevant topic for discussion. However, the reality of Israel's existence and its concern about staying a Jewish state, represent an obstacle to the practical application of the Right of Return for the 1948 Palestinian refugees.⁷⁶

Aware of the importance of the right of return in the Palestinian cause and identity, Abu Zayyad made a distinction between the right of return in theory and its implementation in practice.⁷⁷ He argued that the claim to return does not have to be

http://kms2.isn.ethz.ch/serviceengine/Files/RESSpecNet/57346/ipublicationdocument_singledocument/07ACF594-6581-41B3-850D-ECA270AD32D4/en/11721_0608palrefugees_brynen.pdf; Yasser Darweesh, *Political Solutions for the Palestinian Refugee Issue and Peace Negotiations' Horizons*, SSRN Scholarly Paper, Working Paper Series 2011/36 (ARA) (Birzeit: Forced Migration and Refugee Unit- Birzeit University, 2011), 15, <http://papers.ssrn.com/abstract=2009274>; Salim Tamari, *Palestinian Refugees, Displaced Persons, and the Negotiating Strategy*, Birzeit University Working Paper Series (Birzeit: Forced Migration and Refugee Unit- Birzeit University, 2011), 2, <http://ialiis.birzeit.edu/fmru/etemplate.php?id=164>; Nur Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem* (London: Pluto, 2003), 230.

⁷⁵ Israel sustains until the current day that it did not forcibly displace Palestinians in 1948, blames the refugees and the Arab countries for the displacement and disputes the number of those displaced during the war. Based on this position, the official political position of Israel is that the refugees should be resettled outside Israel as a permanent solution to their problem. See, Danny Ayalon, *The Truth About the Refugees: Israel Palestinian Conflict*, 2011, http://www.youtube.com/watch?v=g_3A6_qSBBQ&feature=youtube_gdata_player; Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem*, 67–8; Steven Glazer, “The Palestinian Exodus in 1948,” *Journal of Palestine Studies* 9, no. 4 (1980): 97.

⁷⁶ Ziad Abu Zayyad, “The Palestinian Right of Return: a Realistic Approach,” *Palestine - Israel Journal of Politics, Economics & Culture* 1, no. 2 (Spring 1994), <http://www.pij.org/details.php?id=749>.

⁷⁷ Ibid.

dropped all together, but that the implementation shall be subject to Israel's agreement to symbolic returns.⁷⁸ He expressed this idea in the following manner:

This [right of return] claim can be satisfied either through the actual return of a mutually acceptable number of refugees, or a symbolic number of them, or through compensation, or even through the implementation of any other option agreed upon through the negotiations on a comprehensive settlement to the Palestinian-Israeli conflict.⁷⁹

Other contributors to the "realistic approach" started to actively advocate for this framework, especially after the failure of the year 2000 Camp David negotiations between the PLO and Israel and the spread of violence. In 2002, the prominent Palestinian intellectual and president of Al-Quds University Sari Nusseibeh⁸⁰ and the Israeli retired military officer and later parliament member and minister Ami Ayalon suggested and promoted an unofficial agreement to end the Palestinian-Israeli conflict on the basis of "two states for two peoples," Palestine being the "only state of the Palestinian people" and Israel "the only state of the Jewish people."⁸¹ On the right of return, the following text was provided:

Recognizing the suffering and the plight of the Palestinian refugees, the international community, Israel, and the Palestinian state will initiate and contribute to an international fund to compensate them.

Palestinian refugees will return only to the State of Palestine; Jews will return only to the state of Israel.

The international community will offer to compensate toward bettering the lot of those refugees willing to remain in their present country of residence, or who wish to immigrate to third-party countries.⁸²

Thus, the initiative suggested that the refugees would re-build their lives outside their country of origin and that they either be resettled in the Palestinian state, remain in their current countries of asylum, or be re-settled elsewhere. Monetary compensation would be paid to the refugee families from an international fund.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ "Sari Nusseibeh - Official Website," accessed December 18, 2012, <http://sari.alquds.edu/>.

⁸¹ Sari Nusseibeh and Ami Ayalon, "Statement of Principles," July 27, 2003, <http://unispal.un.org/UNISPAL.NSF/0/1273B3972DA8E47185256DD00055A0CF>.

⁸² Ibid.

Nusseibeh's approach has been to weigh the total interests of the Palestinian people and the refugees themselves against the "impossible" right of return. As a result of this approach, he found that the Palestinians need to prioritize their most urgent needs as opposed to what they are simply entitled to. He wrote in his recent book:

The argument involves weighing the rights of individuals against the well-being of the Palestinian people as a whole. Placing the refugees' right to return to their original homes at the top of the priority list would prevent the establishment of the best-option scenario (which is by definition a negotiated and therefore conditioned two state solution), and thus would prevent even a partial, watered-down version of that right from being implemented.⁸³

Hence, Nusseibeh's argument is based on a philosophical and moral arguments related to the welfare of the Palestinian people as a whole in light of the urgent need to end the conflict and exercise rights that are achievable within the current political circumstances.

Later in the same year, the Palestinian politician Yasser Abed-Rabbo and the Israeli Knesset Member Yossi Beilin signed their suggested draft agreement known as the "Geneva Accord."⁸⁴ Their agreement provided compensation for the refugees' victimhood, as well as for loss of property. In terms of return, the agreement left any return to Israel subject to "sovereign discretion of Israel" and in limited numbers.⁸⁵

As can be noticed here, the "realistic approach" has advocated a number of suggested solutions to the refugee problem within the context of an overall resolution of the conflict in a two-state solution framework. Their options are taking into serious consideration Israel's total denial of responsibility and consequences, and finding solutions in light of this position; as well as the lack of power balance between the Palestinians and the Israelis. It is justified by a notion of prioritizing reaching a peace agreement over demanding a full "impossible" justice.

A number of academics and human rights practitioners disagreed with the "realistic approach" and proposed resolving the refugee issues based on a "rights based

⁸³ Sari Nusseibeh, *What Is a Palestinian State Worth?* (Harvard University Press, 2011), 140.

⁸⁴ Yossi Beilin and Yasser Abed-Rabbo, "Geneva Accord: Draft Permanent Status Agreement," October 20, 2003, <http://unispal.un.org/UNISPAL.NSF/0/81D0B109A7C334A285256DD400710271>.

⁸⁵ *Ibid.*, Article 7(iv)(c).

approach.” The contributors who belong to this school usually use legal analysis methodology to suggest remedies to violations of international law, based on the implications of state responsibility and Israel’s failure to abide by its international legal obligations. The big exodus of the 1948 war received most of the attention of contributors affiliated with this approach. This seems to be due to the number of those affected by the exodus and, most importantly, because it appeared clear that the victims of this specific wave of mass forcible displacement were the most vulnerable to continuous displacement in light of Israel’s strong position of denial. Similarly, the 1967 exodus received some level of attention, where it was advocated that the refugees of that wave of mass displacement were entitled to similar remedies.

Continuous contemporary displacement has not been considered yet within the framework of conflict resolution and the advancing of peace. It should not be understood that human rights organizations have ignored such displacements. On the contrary, these displacements have been a core issue in the work of such organizations, as shown in the section above. Nonetheless, they have not been put in the wider context of redressing displacement as part of the attempts to advance peace and reconciliation. It appears that the human rights organizations are busy with documenting the violations, reporting them and arguing their illegality to an extent that prevented them from theorizing a framework for the solutions. As will be shown below, this is one of the contributions to knowledge this study is attempting to present.

What makes the advocates of the rights-based approach members of the same school is their methodology, which follows a strict commitment to justice as expressed by the strict implementation of international law. In 1974, Mallison & Mallison explained that law was designed to apply to all states, not that each problem would have its own framework. They later added:

International law is no longer only an ideal alternative. It is also the only practical alternative to an indefinite continuation of the present situation. It may be predicted with considerable assurance that if the present Middle East peace conference is to reach toward peace based upon justice; it will have to employ the principled criteria of international law. Another so-called “practical” settlement

based upon naked power bargaining and calculation will, at best, provide a short interlude between intense hostilities.⁸⁶

This type of justice that should prevail in peace-building focuses on the individuals and their rights under international law. This has been well expressed by one of the prominent academics of this school, John Quigley, who wrote explaining the role of International Law in transitional societies and in moving towards peace. In Quigley's view, states have to respect the rights of the individual while establishing peace agreements. He wrote in that context, after giving an example in the transitions that took place in Eastern Europe in the 1990s:

It has long been recognized that in such situations individuals as such and in their collectivity have legally protected interests that the parties must respect. Peace agreements routinely require states to respect the rights of inhabitants whose ethnic affiliation put them on the side of the erstwhile adversary.⁸⁷

Based on the principles of international law, as well as UN resolutions recognizing some of the rights (as will be shown in Chapter 5), the contributors of the rights based approach consistently advocated for a number of remedies that have to be the outcome of any peace agreement. These remedies are the right to return, restitution of property and/or compensation. Although these remedies do not have to wait for the resolution of the conflict, and in fact need to be implemented immediately as the general principles of international law stipulate and the relevant UN resolutions demand, Israel has linked the solution of this issue with the political negotiations.

From a rights-based perspective, the rights of the refugees and other displaced persons should *not* be treated as a political issue, but rather as a justice goal. But since redress to displacement has become a topic of negotiations, the criteria to be followed while looking for solution should be international law, rather than power balances and political considerations. Michael Lynk explained this notion in the following statement, which can be seen as representative of the general vision of the rights based approach contributors:

⁸⁶ W. T. Mallison and S. V. Mallison, "The Role of International Law in Achieving Justice and Peace in Palestine-Israel," *Journal of Palestine Studies* 3, no. 3 (1974): 79.

⁸⁷ John Quigley, "The Role of Law in a Palestinian-Israeli Accommodation," *Case Western Reserve Journal of International Law* 31, no. 2/3 (1999): 353.

If this final agreement is to be durable, it must reflect the fair aspirations of both parties. As such, it will have to be anchored in the principles of international law, and not simply reflect the starkly unequal bargaining strengths between Israel and the Palestinians.⁸⁸

By the same token, Terry Rempel reviewed the failure of the peace process thus far and reflected a rights-based approach judgment to such failure:

It was the repeated failure to resolve the conflict without reference to the rights and obligations of all respective stakeholders that underscored the need to put international law at the centre of the peacemaking process.⁸⁹

Gail Boling, writing it on behalf of Badil, a Palestinian Refugee Rights Resource Centre, explained the illegality of the displacement in International Law stressing on the individuality of the right of return.⁹⁰ She found that each refugee has the right to choose whether to return or not, without any coercion to take one choice or the other.⁹¹ The individual aspect of this right gives it another dimension in the political sphere, stripping politicians the option of giving it up or using it as a bargaining chip in negotiations. This point was taken further by Glen Rangwala, who conducted a study in 2003 arguing that since this right is individual, as opposed to a collective right, the representative of the Palestinian people has no mandate to even negotiate it, let alone forfeit it. In Rangwala's words:

[T]he right of return has been conceived as a human right, within the sphere of the international law of human rights. In this sense, it is absolute and inalienable, and – crucially in this contrast – it is non-negotiable at the political level. The right rests with the individual, and only the individual can choose not to exercise it at any point in time. From this standpoint, a governing authority or international representative can no more negotiate away an individual's right of return than they can dispense with that individual's right not to be tortured.⁹²

⁸⁸ Michael Lynk, "The Right to Restitution and Compensation in International Law and the Displaced Palestinians," *Canada's Periodical on Refugees* 21, no. 2 (2003): 97.

⁸⁹ Terry Rempel, ed., *Rights in Principle, Rights in Practice: Revisiting the Role of International Law in Crafting Durable Solutions for Palestinian Refugees* (Bethlehem: Badil, 2009), 5.

⁹⁰ Boling, Gail, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*, Badil, (2001)

⁹¹ Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*, 13.

⁹² Glen Rangwala, *Negotiating the Non-negotiable: The Right of Return and the Evolving Role of Legal Standards* (Bethlehem: Badil, 2003), 3.

The same argument has been also made by John Quigley, who argued while explaining the role of international law in solving the Palestinian refugee issue:

The displaced Palestinians should not have to lobby for their right of return, either vis-à-vis Israel or vis-à-vis the Palestinian leadership. The right is guaranteed by human right norms. Just as a state that tortures is obliged to desist without being cajoled and without negotiation, so a state that refuses to repatriate is obliged to desist, namely, by repatriating.⁹³

Hence, the rights-based approach contributors have developed a position according to which the right to return is not only a right, but also a non-negotiable one. Hence, the role of any peace agreement shall be simply to facilitate the implementation of such right, not to negotiate whether to grant its exercise or not.

Nonetheless, in spite of the amount of work that has been conducted on the Palestinian refugee issue, it has been noted that these studies treated this plight as a “unique” one, and therefore, comparative studies in which knowledge and experiences of other refugee problems have not been sufficiently conducted.⁹⁴ The uniqueness of their case is due to the fact that after their displacement in 1948 the United Nations created a special body for administering their affairs, namely the United Nations Relief and Work Agency for Palestinian Refugees in the Near East (UNRWA),⁹⁵ and that they were explicitly excluded from the 1951 Convention Relating to the Status of Refugees in article 1 (D), stating that “This convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations or other than the United Nations High Commissioner for Refugees Protection or assistance.”⁹⁶

According to Dumper, the perceived uniqueness has led to “a restricted range of policy options and operational planning” that draw from the experiences of other conflicts.⁹⁷ In a book he wrote later, he stressed that there are important similarities

⁹³ John Quigley, “International Law and the Palestine Refugees,” *Hastings International and Comparative Law Review* 28 (2005 2004): 409.

⁹⁴ Michael Dumper, *Palestinian Refugee Repatriation: Global Perspectives* (Oxfordshire: Routledge, 2006), 8–10.

⁹⁵ Lex Takkenberg, “UNRWA and the Palestinian Refugees After Sixty Years: Some Reflections,” *Refugee Survey Quarterly* 28, no. 2–3 (January 1, 2009): 253–5.

⁹⁶ “Convention Relating to the Status of Refugees,” 1951, Article 1 (D).

⁹⁷ Dumper, *Palestinian Refugee Repatriation: Global Perspectives*, 8.

among the different refugee problems which should lead us to refer more to international practice while considering the Palestinian cause.⁹⁸ Dumper further argued:

In some sense, all refugee situations are unique in their specificities. Yet at the same time, the phase in the refugee cycle of displacement, dispossession, exile, local integration, resettlement, return, reparation, and reintegration are also features that they all share to some degree with other cases. In this way, legal frameworks, operational practices, and agreed procedures that have evolved over the past few decades become a critical reference point through which peace agreements and those clauses relating to refugees can be evaluated and assessed.⁹⁹

While the Palestinian and Israeli academics and politicians have been stuck with the same discourse of arguing legality, right of return and other basic concepts, they seem to have missed learning from the international experience. To put it simply, while transitional justice mechanisms have been developing through several conflicts around the world, one would only find a handful of writings on their use. As Dumper describes it, the discussion about transitional justice in relation to the Palestinian-Israeli conflict is indeed in its “infancy.”¹⁰⁰

This new stream of scholarship has mainly discussed truth and reconciliation. From the survey conducted in this field, it seems that the main understanding of the meaning of transitional justice has been linked with reconciliation and truth, while other remedies that should be offered were ignored.¹⁰¹ For example, Ron Dudai wrote an article emphasising the importance of truth, describing what it means in terms of the Palestinian-Israeli conflict, outlining a potential method of establishing it and showing the importance of the civil society's participation in a truth commission, in addition to the formal adoption of this mechanism by the authorities.¹⁰² However, his paper only discussed truth and reconciliation, and left out other important justice aspects, such as repatriation and other

⁹⁸ Michael Dumper, *The Future for Palestinian Refugees: Toward Equity and Peace* (United States of America: Lynne Rienner Publishers, 2007), 185.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ See, Cohen Stanley, *Justice in Transition? Proposals for a Palestinian-Israeli Truth Commission*, Middle East Report, No. 194/195, (1995), pp. 2-5; see also, Dudai, Ron, A Model for Dealing with the Past in the Israeli-Palestinian Context, *The International Journal of Transitional Justice*, vol. 1, 2007, 249-267.

¹⁰² Ron Dudai, “A Model for Dealing with the Past in the Israeli–Palestinian Context,” *International Journal of Transitional Justice* 1, no. 2 (July 1, 2007): 249–267.

reparations. In fact, he acknowledges in his conclusions that he does not present his model as the only option for transitional justice, but it is “meant to encourage discussions and debates on potential options and to contribute to a process of exploring the possibilities for truth and reconciliation mechanisms for the area.”¹⁰³ Similarly, Zinadia Miller made another contribution to the debate, suggesting a “commission of inquiry” for Israel/ Palestine.¹⁰⁴ She also mentioned the importance of truth and how it helped in transitional situations elsewhere in the world, while she made no reference to other remedies.¹⁰⁵

Stanley Cohen took a different approach, suggesting that each of the two societies, Israelis and Palestinians, should have their own truth commissions that they employ inside their societies.¹⁰⁶ He argues that the truth has been known as a result of the active Israeli, Palestinian and international civil society, and proposes that there should be truth seeking and reconciliation groups working in each society separately.¹⁰⁷ Although Cohen recognized later that knowing the truth is different from acknowledging it, he still failed to offer models or solutions to this problem.¹⁰⁸

Another important and frequently cited study has been advanced by two professors at Tel-Aviv University, Yoav Peled and Nadim Rohana, who presented a few guidelines on the use of transitional justice mechanisms to help resolve the refugee issue.¹⁰⁹ They, unlike many other writers, articulated the right of return and created a distinction between the right of return and the means of realizing of that right.¹¹⁰ They argue that in a transitional period, Israel should recognize the right of return and accept it,

¹⁰³ Ibid., 266.

¹⁰⁴ Zinadia Miller, “Settling With History: A Hybrid Commission of Inquiry for Israel/Palestine,” *Harvard Human Rights Journal* 20 (2007): 291–323.

¹⁰⁵ Ibid.

¹⁰⁶ Stanley Cohen, “Justice in Transition? Prospects for a Palestinian-Israeli Truth Commission,” *Middle East Report* no. 194/195, Odds against Peace (1995): pp. 2–5.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Yoav Peled and Nadim Rouhana, “Transitional Justice and the Right of Return of the Palestinian Refugees,” in *Israel and the Palestinian Refugees*, ed. Eyal Benvenisti, Chaim Gans, and Sari Hanafi, vol. 1st (Germany: Springer, 2007), 141–157; Yoav Peled and Nadim Rouhana, “Transitional Justice and the Right of Return of the Palestinian Refugees,” *Theoretical Inquiries in Law* 5, no. 2 (2004): 317–332.

¹¹⁰ Peled and Rouhana, “Transitional Justice and the Right of Return of the Palestinian Refugees,” 2007, 157.

but that the negotiations should later discuss the implementation which should take into consideration, according to the authors, the “concerns and interests of Israeli Jews.”¹¹¹ On the issue of truth, they suggested that the Palestinian narrative should become legitimate in Israel, and that the Nakba should be recognized.¹¹² The separation between the right of return as a moral issue on the one hand and its practice on the other hand clearly contradicts with the rights-based approach school, which considers that the refugees are entitled to return “as a matter of right, not as a matter of Israeli grace.”¹¹³ At the same time, Peled’s and Rouhana’s separation between the right of return as part of a narrative and a practice echoes some of the suggestions of the realistic approach stream, such as that of Abu Zayyad quoted above, where he suggested that the right of return be accepted rhetorically but not practically.¹¹⁴

Hence, this new stream of literature that focuses on transitional justice has been generally superficial in considering the range of remedy options offered to the refugees, drawing from international experiences. Furthermore, its approach has conflicted with that of the human rights organizations and international law experts whose rights-based approach focus, as mentioned above, is on repatriation.

The literature that deals with contemporary displacements normally focuses on documentation and argues for illegality, but has not studied the remedies that can be used to end the conflict and move into a reconciliation phase.

In conclusion, the existing literature has covered the factual and historical background of the policy of transfer for both the Palestinian refugees issue and the contemporary displacements issue, and has also argued the illegality of all those displacements. The remedies of the Palestinian refugees issue have been taken into account by authors using different approaches. The authors who refer to the rights discourse mainly focus on repatriation, while others that do take into consideration the question of truth either do not mention, or argue against, a practical nonnegotiable right

¹¹¹ Ibid., 153.

¹¹² Ibid.

¹¹³ Quigley, “Displaced Palestinians and a Right of Return,” 227.

¹¹⁴ Abu Zayyad, “The Palestinian Right of Return: a Realistic Approach.”

to repatriation. The contemporary displacements are still being dealt with as violations that need to be stopped. The continuous and evolving nature of these violations have led human rights organizations to document and argue their illegality, but no consideration of post-conflict remedies has been articulated.

This being the case, the purpose of this thesis is to offer a way to use the current knowledge of the history and the precepts of the rights based discourse to remedy the consequences of the forced displacement policy, within the framework of transitional justice theory and practice. As noted by Raef Zreik, the rights discourse has its shortcomings, most importantly the “renunciation of the frame, the historical context.”¹¹⁵ He further explains that “the Palestinians have lost not only their rights and their land, but also the context that enables them to demand these rights in a way that makes sense.”¹¹⁶ Zreik also contends that the Palestinians have a “right to seek redress within the framework of their loss” which he considers a further “measure of justice.”¹¹⁷ Therefore, this thesis will redraw the macro picture of displacement before working on the remedies.

Similarly, a merely political answer to human rights violations is likely to be driven by an imbalance of powers that lead to solutions which do not redress the victims. This research will therefore offer an overview of this forced displacement policy and will determine potential remedies by drawing from the experiences of other conflicts.

As the conclusions drawn by the historians and the human rights organizations working in the region demonstrate, displacement or, “transfer,” is an important element of the conflict caused by ideological reasons. Ending the conflict needs dealing with this issue in a comprehensive manner. The thesis will utilize the work of historians and human rights organizations when consolidating remedy options. This will be done as an attempt to bridge the gap between the two schools of thought, those who believe that truth and repatriation are mutually exclusive, and those who do not consider truth in the first place because it is not part of the black-letter legal approach.

¹¹⁵ Raef Zreik, “Palestine, Apartheid and the Rights Discourse,” *Journal of Palestine Studies* 34, no. 1 (October 1, 2004): 78.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

1.4 Objective of the Study and its Contribution to Knowledge

Given the need for further research on the subject identified in the literature review, this research aims at making its contribution by defining the parameters of an appropriate transitional justice process that can meaningfully redress the victims of forced displacement within the context of the Palestinian-Israeli conflict.

As shown in the literature review, there is a clear gap in the collective knowledge of academics, human rights practitioners and other contributors on methods to comprehensively deal with the injustices and animosity created by the displacement policies that started during the *Nakba* and continue until today. More specifically, the gap between the new stream of transitional justice literature, which suggests the use of “truth and reconciliation,” and the traditional “rights based approach school” will be part of the focus of this study. Observing other conflicts' remedies demonstrate that a great deal can be learnt from drawing comparisons with other conflicts and examining the applicability of remedies used by them in a future transitional phase to peace, justice and reconciliation. The main objective of this study is to draw from the conclusions of the rights-based approach contributors, the new transitional justice stream as well as the work of historians on the one hand, and the international experience in redressing displacement within the context of transitional justice on the other hand in order to define what a genuine transitional justice framework in the Palestinian-Israeli conflict entails.

1.5 Methodology and Scope of the study

This study will use the transitional justice framework in order to define the parameters of a meaningful redress for the victims of forced displacement in the Palestinian-Israeli conflict. In order to define the scope and research methodology of this study, it is essential to first define what the “field” of transitional justice entails.

Transitional justice has been defined by the prominent theorist, Ruti Teitel, as:

[T]he conception of justice associated with periods of political change, characterized by legal responses to confront with wrongdoings of repressive predecessor regimes.¹¹⁸

¹¹⁸ Ruti G. Teitel, “Transitional Justice Genealogy,” *Harvard Human Rights Journal* 16 (2003): 69.

Further to this definition, the International Centre for Transitional Justice (hereinafter ICTJ) adopts the following definition:

[T]he set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms.¹¹⁹

The two authoritative definitions of transitional justice suggest that this conception has a number of features and goals, which will determine the methodology of this study. First, transitional justice is a “conception of justice.”¹²⁰ The reference frame for this “justice” is international law, most importantly international human rights law, international humanitarian law, international criminal law and international refugee law. As argued by Roger Duthie, transitional justice aims at redressing the legacies of massive human rights abuses, whereby “redressing the legacies’ means, primarily, giving force to human rights norms that were systematically violated.”¹²¹ By the same token, the UN Secretary General’s report on Transitional Justice stipulated that:

For the United Nations, Justice is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs... The Normative foundation for our work is advancing the rule of law is the Charter of the United Nations itself, together with the four pillars of the modern international legal system: international human rights law; international humanitarian law; international criminal law; and international refugee law.¹²²

Hence, the framework of justice that the conception of transitional justice refers to is international law. Furthermore, within the transitional justice framework, one can see that there is an (almost) anonymous agreement on an assumption that peace and justice are not mutually exclusive, but rather complement each other.¹²³ Hence, this thesis will

¹¹⁹ International Center for Transitional Justice, “What Is Transitional Justice?,” *ICTJ Website*, accessed December 18, 2012, <http://ictj.org/about/transitional-justice>.

¹²⁰ Teitel, “Transitional Justice Genealogy,” 69.

¹²¹ Roger Duthie, “Transitional Justice and Displacement,” *International Journal of Transitional Justice* 5, no. 2 (July 1, 2011): 243.

¹²² United Nations Security Council, “The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies” (Report of the Secretary-General, S/2004/616, August 23, 2004), para. 7–9.

¹²³ In a video produced by the ICTJ to promote the idea that justice and peace should be sought together, the former South African president, a Nobel peace prize winner under whose government South Africa ended the era of Apartheid and implemented transitional justice, Nelson Mandela stated: “Justice reinforces peace and the long-term peace that one is looking for.” See, ICTJ, *Peace and Justice*, 2011,

judge Israel's forced displacement policy against the principles of international law, and not any other framework of justice.

Secondly, the field of transitional justice is concerned with societies in transition and is developed by the collective experiences of a large number of countries who seek to redress the injustices of the past, as shown in the ICTJ definition,¹²⁴ by a variety of methods.¹²⁵ As a result of this element in the transitional justice field of study, the current research uses not only the theory of transitional justice, but also the practice of states that redressed displaced persons within the framework of transitional justice. As will be shown in Chapter 5, examples of such states are South Africa, Bosnia and Herzegovina, Sierra Leone, Liberia, Timor-Leste, Colombia and Estonia. Each one of these countries used one or more of the transitional justice measures in redressing the victims of displacement. Hence, this study will seek to analyze how these measures were used and according to which principles.

Thirdly, in the transitional justice framework there is a stress on the element of comprehensiveness in redressing the legacies of past human rights violations.¹²⁶ For example, the UN Secretary General's report states:

http://www.youtube.com/watch?v=PWFpngEfu84&feature=youtube_gdata_player; Furthermore, the UN officially adopts this assumption. See, United Nations Security Council, "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies," para. 21; In addition, several transitional justice contributors have written confirming this concept. For example, see, Wendy Lambourne, "Transitional Justice and Peacebuilding After Mass Violence," *International Journal of Transitional Justice* 3, no. 1 (March 1, 2009): 28–48; See also, Rama Mani, "Balancing Peace with Justice in the Aftermath of Violent Conflict," *Development* 48, no. 3 (September 2005): 25–34; ICTJ, *Pursing Peace, Justice or Both?*, Fact Sheet, Focus: Peace and Justice (New York: International Center for Transitional Justice, April 25, 2009); Marieke Wierda, "Remarks by Marieke Wierda," in *American Society of International Law Proceedings* (presented at the Peace v. Justice: Contradictory or Complementary, American Society of International Law, 2006), 369–370; Kai Ambos, "The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC," in *Building a Future on Peace and Justice: Studies on Transitional Justice, Conflict Resolution and Development: The Nuremberg Declaration on Peace and Justice*, ed. Kai Ambos, Judith Large, and Marieke Wierda (Springer, 2009), 19.

¹²⁴ International Center for Transitional Justice, "What Is Transitional Justice?"

¹²⁵ Christine Bell, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'," *International Journal of Transitional Justice* 3, no. 1 (March 1, 2009): 5–27; Teitel, "Transitional Justice Genealogy."

¹²⁶ Barbara Ooman, "Justice Mechanisms and the Question of Legitimacy: The Example of Rwanda's Multi-layered Justice Mechanisms," in *Building a Future on Peace and Justice: Studies on Transitional Justice, Conflict Resolution and Development: The Nuremberg Declaration on Peace and Justice*, ed. Kai Ambos, Judith Large, and Marieke Wierda (Springer, 2009), 179; Pablo De Greiff, "DDR and Reparations: Establishing Links Between Peace and Justice Instruments," in *Building a Future on Peace and Justice: Studies on*

Our experience confirms that a piecemeal approach to the rule of law and transitional justice will not bring satisfactory results in a war-torn or atrocity-scarred nation. Effective rule of law and justice strategies must be comprehensive, engaging all institutions of the justice sector, both official and non-governmental, in the development and implementation of a single nationally owned and led strategic plan for the sector. Such strategies must include attention to the standards of justice, the laws that codify them, the institutions that implement them, the mechanisms that monitor them and the people that must have access to them.¹²⁷

As accepted by the Secretary General's report, "satisfactory results" can only come about when a comprehensive approach to justice is sought by the transitional society. This holistic approach entails two elements: the first is comprehensiveness in understanding the problem by seeking the truth about how, why, by whom and against whom human rights violations took place; the second element is comprehensiveness in seeking redress by using the appropriate measures including reparations, accountability of perpetrators and reforming the state institutions and legal system.¹²⁸

In order to follow the transitional justice framework methodologically, this research project has been designed to examine and analyze the facts within the thematic scope of the study in a rigorous and comprehensive manner. The methodology of fact

Transitional Justice, Conflict Resolution and Development: The Nuremberg Declaration on Peace and Justice, ed. Kai Ambos, Judith Large, and Marieke Wierda (Springer, 2009), 344–8; Alex Boraine, "Transitional Justice," in *Pieces of the Puzzle: Keywords on Reconciliation & Transitional Justice*, ed. Charles Villa-Vicencio, Erik Doxtader, and Richard Goldstone (African Minds, 2004), 68; Bell, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'," 19; Duthie, "Transitional Justice and Displacement," 258; Oskar NT Thoms, James Ron, and Roland Paris, *The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners*, CIPS Working Paper (University of Ottawa: Centre for International Policy Studies, April 2008), 24–5; United Nations Security Council, "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies," 23.

¹²⁷ United Nations Security Council, "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies," 23.

¹²⁸ It is widely accepted in transitional justice literature that there are four categories of measures to redress a human rights violations legacy: truth, reparations, accountability and state institutions reform. Duthie, "Transitional Justice and Displacement," 243; International Center for Transitional Justice, "What Is Transitional Justice?"; Bell, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'," 6–10; Boraine adds a fifth element for a holistic transitional justice approach: Reconciliation. This is based on the experience of several transitional societies organizing commissions for truth and reconciliation. Boraine, "Transitional Justice"; Ambos cites all these measures as well, but also adds one additional element, namely the "disarmament, demobilizing and reintegration" of former members of armed groups. Ambos, "The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC," 48.

analysis is inspired by the mandates of truth commissions in several countries.¹²⁹ For example, according to the mandate of the Timor-Leste Truth Commission, the elements that the commission was required to investigate while examining human rights violations included:

The context, causes, antecedents, motives and perspectives which led to the violations; whether they were part of a systematic pattern or abuse; the identity of persons, authorities, institutions and organizations involved in them; whether they were the result of deliberate planning, policy or authorisation on the part of the state, political groups, militia groups, liberation movements or other groups or individuals; the role of both internal and external factors; and accountability, “political or otherwise,” for the violations.¹³⁰

This example of a truth commission mandate is representative of dozens of other mandates and of the idea of comprehensiveness of the transitional justice framework. Since the role of a transitional justice process is to comprehensively redress the victims, a full understanding of the problem is required before a meaningful redress is provided. Therefore, this thesis will analyze the methods that Israel used in displacing Palestinians and making their displacement durable. It will seek to explain patterns of displacement, and determine and scrutinize the tools that are used to inflict such displacement such as laws, military orders and violence. Furthermore, it will examine the motives behind these displacements and their effects on the victims. As will be noted, this thesis will focus on the role that the Israeli legal regime, with its laws and military orders as well as civil and military courts, has played in inflicting mass displacements. Finally, the patterns that will be detected in the factual analysis will inform the remedy options.

Due to the great meticulousness that is required in analyzing the data and the large amount of violations related to forced displacement in the Palestinian-Israeli conflict, the scope of this study has been narrowed down thematically to two methods of displacements: displacements that took place during the wars of 1948 and 1967 and

¹²⁹ Sierra Leone Truth and Reconciliation Commission, “Final Report of the Sierra Leone Truth and Reconciliation Commission,” 2004, vol. 1, Chapter 1: 25; Truth and Reconciliation Commission of Liberia, “Final Report of the Truth and Reconciliation Commission of Liberia,” 2009, vol. 1: 16; Commission for Reception, Truth and Reconciliation in East Timor, *Part 2: Mandate of the Commission*, Chega! Final Report of the Reception, Truth and Reconciliation in East Timor, 2005, 2.

¹³⁰ Commission for Reception, Truth and Reconciliation in East Timor, *Part 2: Mandate of the Commission*, 2.

displacements that were related to Israel's policy of status revocation or deprivation. These issues will be discussed in considerable depth. However, because of the limitations of a PhD thesis, other methods of forced displacement will be outside the scope of this study. The methods of displacement that have been excluded from this study include home demolitions, unrecognized villages, discrimination in zoning and urban planning and creating hardships that force populations to leave their villages and towns.

The second element of comprehensiveness, as mentioned earlier, is the remedy options. This thesis will discuss the full range of remedies that can be provided to the victims with their four elements: truth, accountability, reparations and legal and institutional reform.

Based on this methodological framework, the research has been conducted taking the following steps:

- Firstly, examining and analyzing the facts of the displacements that fall within the scope of this thesis. This scope will be limited to the displacements that took place during the major wars, as well as displacements that resulted from Israel's regulatory engineering to revoke or deny a legal status to persons and to deport them consequently. These facts are examined by analyzing primary materials such as laws, military orders and court decisions. Furthermore, secondary materials such as reports of human rights organizations and UN agencies, books and journal articles have been used extensively. In some cases, the relevant violations have been made known only by them being documented and reported by human rights violations. Similarly, the findings of historians have a significant contribution to the factual analysis of this thesis.
- Secondly, examining the legality of the Israeli forced displacements within the framework of international law. This is done by defining the applicable international legal instruments and examining the Israeli policies of displacement against them. The primary materials that have been used for this part include customary international law, conventions of international human rights law and international humanitarian law, cases from international courts and tribunals, UN resolutions and others. In addition, secondary materials such as relevant legal studies, UN reports, human rights organizations literature and others have been used.
- Thirdly, examining the appropriate measures that can be used to redress the victims of forced displacement within the framework of transitional

justice theory and practice. The primary material that has been used for this task includes peace agreements; relevant constitutions, statutes and policies of countries that used a transitional justice framework; and official reports of truth commissions. The secondary material includes reports of non-governmental organizations and research centres as well as academic studies.

1.6 The Thesis Structure

The thesis contains 4 core chapters. Chapter 2, *“Displacement of Palestinians in the Aftermath of Wars”* will discuss the displacements that took place in the wars of 1948 and 1967. This chapter will examine how in each of the two wars, Israel used military operations, deprivation from status and prevention from return as tools to inflict and cement the displacement of the majority of the Palestinian population. The role of Israel’s nationality law, prevention of infiltration law and series of military orders and residency regulations will be analyzed.

Chapter 3, entitled *“Continuous Displacement and Status Engineering,”* will examine Israel’s policies that inflicted continuous displacements in areas under its sovereignty and in the OPT. These policies include residency revocation regulations under its civil and military laws, prevention of child registration, prevention of family unification and freezing the ability for people to change their address within the OPT.

Chapter 4, bearing the title *“The Legality of Forced Displacement in the Palestinian-Israeli Conflict,”* examines the legality of Israel’s forced displacement policies. It will start by examining the international legal instruments that are applicable to Israel and the OPT. After that, it will analyze the legality of Israel’s forced displacement policy according to international criminal law, international human rights law, international humanitarian law, as well as the laws of nationality and state succession.

Finally, Chapter 5 entitled *“The Parameters of a Transitional Justice Approach to Addressing Israel’s Forced Displacement Policies”* will offer the application of the transitional justice framework to the conflict. It will begin by reviewing how the current peace process framework has tackled the issue of displacement with all its elements. After that, it will examine the international legal rules on state responsibility and individual criminal responsibility, as a legal foundation for the transitional justice remedies. Towards

the end, the chapter will study the potential remedies that can be applied to redress the victims of displacement, and the parameters that would govern the use of these remedies. Each of the remedy options will be examined against the theory of transitional justice and examples of state practice from different regions.

Chapter 2- Displacement of Palestinians in the Aftermath of Wars

2.1 Introduction

It was mentioned in the previous chapter that Israel intentionally displaced hundreds of thousands of Palestinians during the wars of 1948 and 1967 and prevented them from returning to their homes. This took place by employing methods that combine physical military coercion and regulatory engineering that aimed at controlling citizenship, residency and movement to guarantee a sustained exile for the victims of displacement.

This chapter will examine the measures taken by Israel to inflict these two exoduses. It will do so while following the research methodology explained in Chapter 1, attempting to give sufficient attention to the context in which the displacements were conducted and sustained. The analysis presented in this chapter will attempt to serve two goals: establishing a concrete factual basis for the legal analysis that will be presented in Chapter 4; and equally importantly, serving as the basis for part of the comprehensive remedy approach that will be considered in Chapter 5. These goals can be reached by answering the following questions: How did the two exoduses take place during the wars? Who was responsible of them? Why did they happen? And finally, how did the applicable legal and institutional system deal with them?

To answer these questions, the war operations will first be analyzed based on the work of historians, especially those who found their conclusions based on Israeli archives, the statements of eye witnesses, and the documentation of human rights organizations. Then, special attention will be given to examining the legal regime introduced by Israel to regulate citizenship in Israel and residency in the OPT and how this regime functioned in sustaining the displacement of the refugees.

The measures that Israel used to inflict a durable displacement of the majority of the Palestinian population can be summarized by: war operations, prevention from

acquiring a permanent legal status and prevention from return. Each of these three elements will be examined in relation to the victims of displacement of the wars of 1948 and 1967.

2.2 The Nakba: The 1948 War and Forced Displacement

Following the 1947 UN General Assembly resolution 181¹ that recommended the division of Palestine into two states, one Arab and one Jewish, a war broke out in Palestine. The first phase of it was described by historians as a civil war that broke out between the Arab and Jewish inhabitants of Palestine.² During this phase of the war a large number of atrocities were committed, and around 250,000 Palestinian Arabs took refuge in the neighbouring Arab countries.³ One of the most famous of these atrocities was Dair Yasin massacre, in which Jewish troops killed indiscriminately a large number of civilians of the village of Dair Yasin and raped a number of women.⁴ According to Pappe, “the Jewish leadership proudly announced a high number of victims” to urge the inhabitants of other villages to leave their homes.⁵

This phase of the war extended between the date of issuing resolution 181 in November 1947 until the 14th of May 1948 when the Zionist leadership declared a Jewish State, and the following day, the 15th of May when Britain officially declared ending its mandate in Palestine and withdrawing its troops. Then, the Arab League, which is a regional international organization “that consists of independent Arab States on the territory of northern and north-eastern part of Africa and southwest Asia,”⁶ started an armed “intervention” that it justified by a number of reasons, including stopping the displacement. They stated justifying their intervention:

¹ UN General Assembly, “Resolution 181 (II) Future Government of Palestine,” November 21, 1947.

² Benny Morris, *The Birth of the Palestinian Refugee Problem Revisited*, 2nd ed. (Cambridge University Press, 2004), 13; Ilan Pappe, *The Ethnic Cleansing of Palestine* (Oxford Oneworld, 2007), 51; Rashid Khalidi, “The Palestinians and 1948: The Underlying Causes of Failure,” in *The War for Palestine: Rewriting the History of 1948*, ed. Eugene L. Rogan and Avi Shlaim, 2nd ed. (Cambridge University Press, 2007), 13.

³ Pappe, *The Ethnic Cleansing of Palestine*, 40.

⁴ Ibid., 90.

⁵ Ibid.

⁶ Arab League, “Presentation of the Arab League,” *Arab League Online*, September 13, 2012, <http://www.arableagueonline.org/hello-world/#more-1>.

Security and order in Palestine have become disrupted. The Zionist aggression resulted in the exodus of more than a quarter of a million of its Arab inhabitants from their homes and in their taking refuge in the neighbouring Arab countries. The events which have taken place in Palestine have unmasked the aggressive intentions and the imperialistic designs of the Zionists, including the atrocities committed by them against peaceful Arab inhabitants, especially in Dayr Yasin, Tiberias and others.⁷

This phase of the war continued until 1949, when Israel signed four separate armistice agreements with Jordan, Egypt, Syria and Lebanon.⁸ The end of this war resulted in Israel being established on 78% of mandatory Palestine, while the rest, the West Bank and Gaza Strip, had a Jordanian and an Egyptian military presence respectively.

By the end of this war, around 700,000 to 900,000⁹ Palestinians were displaced from their homes, and as many as 531 villages were destroyed and de-populated.¹⁰ This number of Palestinians displaced represents 80% of the Palestinian population in what became Israel after the war.¹¹

The reasons behind this exodus have been disputed. Following the war, there were two narratives that described how this large number of refugees was displaced. The Israeli narrative blamed the Arab leaders and the refugees themselves for the exodus, claiming

⁷ Arab League, "Statement of the Arab Governments on the Entrance of Arab Armies to Palestine," May 15, 1948, Original Arabic text is available at Al-Nakba Website. http://www.idsc.gov.ps/sites/nakba/nakba48/1948.html#_ftn35, an unofficial English translation is available at the website of the Israeli ministry of foreign affairs. <http://www.mfa.gov.il/MFA/Foreign+Relations/Israels+Foreign+Relations+since+1947/1947-1974/5+Arab+League+declaration+on+the+invasion+of+Pales.htm>.

⁸ Israel and Jordan, "Hashemite Jordan Kingdom-Israel: General Armistice Agreement" (Rhodes, April 3, 1949); Israel and Syria, "Israeli-Syrian General Armistice Agreement" (Rhodes, July 20, 1949); Israel and Egypt, "Egyptian-Israeli General Armistice Agreement" (Rhodes, February 23, 1949); Israel and Lebanon, "Lebanese-Israeli General Armistice Agreement" (Rhodes, March 23, 1949).

⁹ Morris asserts that the number of refugees has been disputed, and estimates that it would be around 700,000 Palestinians. Morris, *The Birth of the Palestinian Refugee Problem Revisited*; The United Nations Conciliation Commission for Palestine estimated the number of refugees displaced by the war as between 800,000 and 900,000. United Nations Conciliation Commission for Palestine, "Historical Survey of Efforts of the United Nations Conciliation Commission for Palestine to Secure the Implementation of Paragraph 11 of the General Assembly Resolution 194(III): Question of Compensation (Working Paper Prepared by the Secretariat)," October 2, 1961, U.N. Doc. A/AC.25/W/81/Rev.2, <http://domino.un.org/UNISPAL.NSF/0/3e61557f8de6781a052565910073e819?OpenDocument> There are many other estimates provided by the parties to the conflict, academics, and many other contributors, but the real number of refugees is not the focus of this thesis.

¹⁰ Pappe, *The Ethnic Cleansing of Palestine*, XIII.

¹¹ Nur Masalha, *Expulsion of the Palestinians: The Concept of "Transfer" in Zionist Political Thought 1882-1948* (Washington: Institute for Palestine Studies, 1992), 175.

that the refugees left either because they did not want to live with the Jews or because their leaders told them to leave either through Radio broadcasts or other media.¹² In contrast, the Palestinians and the rest of the Arabs argued that the large number of refugees was a result of a systematic expulsion orchestrated by the Zionist leadership, aiming at changing the demographic balance of the areas on which Israel was established to tilt in favour of the Jews.¹³

Despite the large gap between these two narratives, important facts were unveiled by a new stream of Israeli historiography demonstrating several causes for this exodus.¹⁴ The conclusions of most of the new historiography regarding causes of the exodus indicated an intentional Israeli involvement to “expel” Palestinians, as will be shown in the next section below.¹⁵ In addition, the expulsion was cemented and institutionalized by the enactment of a number of actions and laws that guaranteed that the refugees will not be allowed to return.¹⁶ The following three sub-sections will discuss the three elements of the expulsion: the war operations, the prevention from acquiring a legal status, and prevention from return by military and regulatory methods.

2.2.1 The War Plan and Operations

In the late 1980s, a new wave of Israeli historiography on the causes of the exodus was launched by the Israeli historian Benny Morris following the opening of part of the

¹² Steven Glazer, “The Palestinian Exodus in 1948,” *Journal of Palestine Studies* 9, no. 4 (1980): 97; Nur Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem* (London: Pluto, 2003), 2; This point of view has been sustained by the Israeli government until today. A recent YouTube video produced by the Israeli Foreign Ministry quotes the Israeli Deputy Foreign Minister saying: “Encouraged by Arab Leaders, who promised they would return as victors, and later on, as a result of their failed war efforts... an estimated 500,000 Arabs fled to neighbouring Arab territories.” Danny Ayalon, *The Truth About the Refugees: Israel Palestinian Conflict*, 2011, http://www.youtube.com/watch?v=g_3A6_qSBBQ&feature=youtube_gdata_player.

¹³ Glazer, “The Palestinian Exodus in 1948,” 97; Arif Al-Arif, *Al-Nakbah, Nakbat Bayt Al-Maqdis wal-Firdaus Al-Mafquous Al-Mafqood 1947-52 (The Disaster: The Disaster of Jerusalem and the Lost Paradise 1947-52)*, vol. 1st (Jerusalem: Al-Maktabah Al-Asirah, 1956), 1082; W. Khalidi, “Plan Dalet: Master Plan for the Conquest of Palestine,” *Journal of Palestine Studies* 18, no. 1 (1988): 4–33.

¹⁴ The Israeli historian Avi Shlaim showed that the causes of the displacement of the Palestinian refugees was one of six issues that the “new historians” unveiled challenging the traditional Israeli narrative. The other issues were: the British policy towards the establishment of the Jewish State, the military balance between the rivals, the Israeli Jordanian relations, the Arab war aims, and the elusive peace. A. Shlaim, “The Debate About 1948,” *International Journal of Middle East Studies* 27, no. 3 (1995): 287–304.

¹⁵ See, sec. 2.2.1 below.

¹⁶ This will be explained in more detail in sec. 2.2.2 and sec. 2.2.3 below.

Israeli archives for researchers. His book, published in 1988, cited a number of reasons causing the 1948 exodus, including direct expulsion orders as part of the military plan called "Plan Dalet," as well as what he called "Jewish psychological warfare" referring to propaganda designed to create fear and intimidate inhabitants into leaving; in addition to what he called the "atrocities factor," referring to the fear of the Arab villagers based on atrocities that actually took place around them, like the Deir Yassin massacre.¹⁷ He also blamed the Arab leadership for being "disunited" and for not guiding the Arab population on how to deal with the situation; but also wrote that the Palestinian leadership resisted the exodus by several unsuccessful means, except in certain instances when Arab army commanders ordered a temporary evacuation of Arab civilians from dangerous battle areas.¹⁸ Despite that, Morris wrote that he found no track of Arab instructions by radio or other means of communication advising the population to leave, as the official Israeli narrative claims.¹⁹ Notwithstanding these findings, Morris found that the Zionist leadership did not have a premeditated master plan to expel the Palestinians.²⁰

Several historians have built on the work of Morris and found that the displacement of the 1948 refugees was inflicted intentionally by Israel aiming at guaranteeing a Jewish majority in the state that was being formed. Some criticized him for his final conclusion, especially in light of his own findings of intentional mass expulsions.²¹

Nur Masalha researched the Israeli archives and other sources and concentrated on the links between the Zionist movement's ideological motives to create a Jewish state with a majority of Jews and the actions conducted by its leadership in the war, concluding that "the notion of transfer was born almost at the same time as political Zionism itself, with [Theodore] Hertzl's²² hope to 'spirit the penniless population across the border.'"²³

¹⁷ Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947-1949*, vol. 1st (Cambridge: Cambridge University Press, 1987), 287–8.

¹⁸ Ibid., 1st:289–90.

¹⁹ Ibid., 1st:290.

²⁰ Morris, *The Birth of the Palestinian Refugee Problem Revisited*, 588.

²¹ Nur Masalha, "A Critique on Benny Morris," in *The Israel-Palestine Question: Rewriting Histories*, ed. Ilan Pappé, 2nd ed. (Routledge, 2009), 184–192.

²² Theodore Hertzl is the founder of Political Zionism.

²³ Masalha, *Expulsion of the Palestinians: The Concept of "Transfer" in Zionist Political Thought 1882-1948*, 107.

He quoted minutes of meetings and conferences, letters, speeches, and other documents he found in the official Israeli archives, and then studied the war and argued that “the evacuation of the great majority of the Palestinian population in 1948 took place against the background of war and military campaigns; it was a time during which opportunities... were not missed.”²⁴

Ilan Pappé conducted his own archival work and built on both Morris's and Masalha's research and argued that the exodus was a premeditated goal translated by the Israeli military plan called “Plan Dalet” which according to Pappé “called for their [i.e. the Palestinians'] systematic and total expulsion from their homeland,” regardless of whether they would collaborate with or oppose the establishment of the Jewish state.²⁵ He cited the Plan Dalet text that instructs the expulsion of the population outside the borders of the state in case of “resistance.”²⁶ Pappé demonstrated that the Zionist movement in Palestine mapped the area that it wanted to establish Israel on in 1946,²⁷ and collected intelligence about each city and village in Palestine prior to the war.²⁸ When the plan was finished it was given to all the commanders and each one received “a detailed description of the villages in his field of operation and their imminent fate- occupation, destruction and expulsion.”²⁹

According to an internal report issued by the Israeli army intelligence in June 1948, that is, in the middle of the war, around 75% of the 350,000 refugees displaced by then were displaced as a result of: direct hostile Jewish operations against Arab towns and villages, the effect of operations on nearby towns and villages, Jewish “whispering operations,” and ultimate expulsion orders by Jewish forces.³⁰ The rest were displaced by a combination of several fear factors, either because of being isolated villages near Jewish

²⁴ Ibid., 208.

²⁵ Pappé, *The Ethnic Cleansing of Palestine*, 28.

²⁶ Ibid., 16.

²⁷ Ibid.

²⁸ Ibid., 10–14.

²⁹ Ibid., 17.

³⁰ Benny Morris, “The Causes and Character of the Arab Exodus from Palestine: The Israeli Defense Forces Intelligence Services Analysis of June 1948,” in *The Israel-Palestine Question: Rewriting Histories*, ed. Ilan Pappé, 2nd ed. (New York and London: Routledge, 1999), 171–5.

colonies, or for fearing of their villages being used as battle fields, or fear of Jewish retaliation following major Arab attacks.³¹

To summarize, it can be concluded that while the historians disagree about whether there had been a master plan for expulsion, they all agree that there were enormous mass expulsion orders and intimidation into departure by creating fear through massacres and what Morris calls “whispering operations.” They also agree that the leadership of Jewish Yishuv (Jewish colonies in Palestine) and later the state of Israel were the planners of these operations, and that the army commanders were aware of the plans of the state. Khalidi eloquently summarized the methods used for expulsion with by writing: “The Zionist offensive which caused the Arab exodus was a mixture of psychological and terroristic warfare.”³²

It is also undeniable that the refugees were prevented from return after they were displaced. As noted by Morris:

If a measure of ambivalence and confusion attended Haganah/ IDF treatment of Arab communities during and immediately after conquest, there was nothing ambiguous about Israeli policy, from summer 1948, toward those who had been displaced and had become refugee and toward those who were yet to be displaced, in further operations: Generally applied with resolution and, often, with brutality, the policy was to prevent a refugee return at all costs. And if, somehow, refugees succeeded in infiltrating back they were routinely rounded up and expelled... In this sense, it may fairly be said that all 700,000 or so who ended up as refugees were compulsorily displaced or ‘expelled’.³³

Morris’s statement here refers to the measures taken by Israel during and after the war in order to prevent those displaced from return. These measures can be put under two categories: the denial from acquiring citizenship; and the prevention from return through physical and regulatory means. These measures will be explained in the following two sub-sections.

³¹ Ibid.

³² W. Khalidi, “Why Did The Palestinians Leave, Revisited,” *Journal of Palestine Studies* 34, no. 2 (2005): 49.

³³ Morris, *The Birth of the Palestinian Refugee Problem Revisited*, 589.

2.2.2 The Denial of Citizenship

Since the early establishment of the state, Israeli Nationality was regulated through two legislations: the *Law of Return, 5710-1950* (hereinafter Law of Return)³⁴ and Nationality Law, 5712-1952 (hereinafter Nationality Law)³⁵ in a way that served the purpose of the main stream Zionist leaders to replace Palestinians inhabiting Palestine with Jews.³⁶ The text and enforcement of the laws were an early translation of this aim.

The Law of Return gave a right to every Jew around the world, regardless of their nationality, or whether or not they were falling under any threat of persecution, the right to immigrate to Israel as an "*Oleh*" a special title of Jews immigrating to Israel.³⁷ It states: "Every Jew has the right to come to this country as an *Oleh*,"³⁸ with the exception of those who are "engaged in an activity directed against the Jewish people or... [are] likely to endanger public health or the security of the state,"³⁹ or as added in an amendment to the law in 1954 those who have "a criminal past, likely to endanger public welfare."⁴⁰ In 1970, the scope of implementation of the law was widened to involve "a child of a Jew and the grandchild of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew,

³⁴ *The Law of Return, 5710-1950, Published in Sefer Ha-Chukkim No. 51 of the 21st Tammuz, 5710 (5th July, 1950), p. 159, 1950, Translation provided at the website of the Israel Ministry of Foreign Affairs, available at: http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Law%20of%20Return%205710-1950.*

³⁵ *Nationality Law, 5712-1952, Published in Sefer Ha-Chukkim No. 95 of the 13th Nisan, 5712 (8th April, 1952), P. 146, 1952.*

³⁶ David Kretzmer, *The Legal Status of the Arabs in Israel*, Westview Special Studies on the Middle East (Boulder ; Oxford: Westview, 1990), 35.

³⁷ In Hebrew, a Jew is said to be "*Oleh La-Erets Yisrael*" which literally means escalating to the Land of Israel. See, S. Sharot, "Israel: Sociological Analyses of Religion in the Jewish State," *Sociology of Religion* 51, no. Special Issue (1990): S64.

³⁸ *The Law of Return, 5710-1950.*

³⁹ *Ibid.*

⁴⁰ *Law of Return (Amendment 5714-1954), Published in Sefer Ha-Chukkim No. 163 of the 3rd Elul, 5714 (1st September, 1954) P. 174, 1954, Translation provided at the website of the Israel Ministry of Foreign Affairs, available at: http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Law%20of%20Return%205710-1950.*

except for a person who has been a Jew and has voluntarily changed his religion.”⁴¹ By the power of this law, millions of Jews from all over the world have immigrated.⁴²

Between 1948 and 1952, Israel did not enact legislation on nationality and organized its first elections based on residency determining that whoever was an inhabitant of Israel participated in the two elections that took place in that period.⁴³ Then, in 1952, Israel enacted its Nationality Law⁴⁴ which was designed to establish two goals: Grant citizenships to every past and future Jewish immigrant to Israel, and restrict as much as possible the grant of citizenship to non-Jews, especially the Palestinians who were displaced during and after the war.⁴⁵

The Law of Nationality provided different regulations on acquiring Israel’s citizenship for Jews and non-Jews. The Israeli citizenship for Jews was given automatically for everyone who was an “*Oleh*” according to the Law of Return,⁴⁶ and could also be acquired by birth to Israeli nationals.⁴⁷ However, citizenship to non-Jews was subject to the sections of the statute regulating “Nationality by Residency,”⁴⁸ and “Nationality by

⁴¹ *Law of Return (Amendment No. 2) 5730-1970, Published in Sefer Ha-Chukkim No. 586 of the 11th Adar Bet, 5730 (19th March, 1970), P. 34, 1970*, Translation provided at the website of the Israel Ministry of Foreign Affairs, available at:

http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Law%20of%20Return%205710-1950.

⁴² The Jewish Agency mentioned in 2013 that Israel absorbed more than 3 million Jewish immigrants. See, The Jewish Agency for Israel, *Practical Visionaries: Securing the Jewish Future for Generations*, 2011/ 2012 Performance Report, 2012, <http://www.jewishagency.org/JewishAgency/English/About/Updates/Annual+Report>.

⁴³ Louis A. Warsoff, “Citizenship in the State of Israel--A Comment,” *New York University Law Review* 33 (1958): 857.

⁴⁴ *Nationality Law, 5712-1952*.

⁴⁵ Salman Abu Sitta, “The Israeli Law of Return, Dual Loyalty and the Status of Jewish Communities Outside Israel,” in *The Israeli Law of Return & Its Impact on the Struggle in Palestine*, ed. Daud Abdullah (Palestinian Return Centre, 2004), 120–22; Ayelet Shachar, “Whose Republic: Citizenship and Membership in the Israeli Polity,” *Georgetown Immigration Law Journal* 13 (1999 1998): 249–50; M. D. Gouldman, *Israel Nationality Law* (Institute for Legislative Research and Comparative Law, 1970), 70–1; Sabri Jiryes, “Domination by the Law,” *Journal of Palestine Studies* 11, no. 1, 10th Anniversary Issue: Palestinians under Occupation (1981): 80.

⁴⁶ *Nationality Law, 5712-1952*. Article 2(a) states: “Every ‘Oleh’ under the Law of Return, 5710-1950, shall become an Israel national by return unless Israel nationality has been conferred on him by birth under section 4.”

⁴⁷ *Ibid.* sec 4 provides, as a general rule, that the child of an Israel national acquires Israeli nationality, with the exception of a child who was born outside Israel to parents none of whom was a national born in Israel.

⁴⁸ *Ibid.*, sec. 3.

Birth.”⁴⁹ Article 3 (a) of the law, that dealt with “Israeli Nationality by Residence in Israel,”⁵⁰ excluded all the Palestinian refugees, and many of the Palestinians who continued to reside in what became Israel after the war, from its nationality.⁵¹ It stated that:

A person who, immediately before the establishment of the state, was a Palestinian Citizen and who does not become an Israel national under section 2 [which deals with the 'Oleh' status mentioned above which is given only to Jews], shall become an Israel national... if (1) he was registered on the 4th Adar, 5712 (1st March 1952) as an inhabitant under the Registration of Inhabitants Ordinance, 5709-1949; and (2) he is an inhabitant of Israel on the day of the coming into force of this law; and (3) he was in Israel, or in an area which became Israel territory after the establishment of the state, from the day of the establishment of the state to the day of the coming into force of this law, or entered Israel legally during that period.⁵²

In other words, the Nationality law granted citizenship only to those Palestinians who were physically present in Israel and whose residence was not interrupted by their displacement outside the borders, given that they managed to register themselves as inhabitants before the deadline set by this law.⁵³ This was a regulatory translation of Israel’s policy, as explained by Hofnung, to “prevent the Arab refugees from returning to the new state.”⁵⁴ In addition to that, however, the law had further reaching negative consequences to non-Jewish inhabitants of Israel. The *Registration of Inhabitants Ordinance* mentioned in the provision quoted above was enacted in 1949, and gave inhabitants of Israel 30 days from its enactment or their entry into Israel to register themselves and their minor children.⁵⁵ Because of the hostilities of the war, many Palestinians, who were not even displaced failed to register, and therefore, were unable

⁴⁹ Ibid., sec. 4.

⁵⁰ Ibid., sec. 3.

⁵¹ Gail Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis* (Bethlehem, Palestine: Badil, 2001), 26.

⁵² *Nationality Law, 5712-1952*, sec. 3(a).

⁵³ Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*.

⁵⁴ Menahem Hofnung, *Democracy, Law, and National Security in Israel* (Aldershot: Dartmouth Pub. Co, 1996), 77.

⁵⁵ *Registration of Inhabitants Ordinance No. 50 of 5709-1949, “Laws of the State of Israel: Authorized Translation from the Hebrew, Volume 2”*. Government Printer, Jerusalem, Israel (1948-1987), P. 103-6, 1949.

to claim their citizenship;⁵⁶ together with those who were displaced. Effectively, not only did this law manage to prevent the hundreds of thousands who were displaced from Israel's citizenship, but also affected thousands who were still within the Israeli borders; many of whom became later victims of deportation.⁵⁷ Israel made two amendments to its Nationality law in 1968⁵⁸ and 1980⁵⁹ that allowed many of those who continued to reside in Israel, but were still rendered stateless as a result of the conditions set by the 1952 Nationality Law, to acquire citizenship.⁶⁰ The first amendment to the law in 1968 allowed Palestinians who were born after the establishment of the state to apply for citizenship between their eighteenth birthday and twenty-first birthday; given that they had not gained another nationality and if they had been residing in Israel for "five consecutive years immediately preceding the day of the filing of [their] application."⁶¹ The second amendment gave citizenship to the majority of the others left stateless as a result of the original law and the first amendment, but still excluded all the refugees who were displaced during the war and after by deciding that residency in Israel was a condition to the acquiring of citizenship.⁶²

⁵⁶ Jiryès, "Domination by the Law," 80; Shachar, "Whose Republic," 107.

⁵⁷ Jiryès, "Domination by the Law," 80; Kretzmer, *The Legal Status of the Arabs in Israel*, 37; Hofnung, *Democracy, Law, and National Security in Israel*, 80.

⁵⁸ *Nationality (Amendment No. 2) Law, 5728—1968, Published in Sefer Ha-Chukkim No. 538 of the 22nd Av, 5728 (16th August, 1968), P. 212, 1968.*

⁵⁹ *Nationality (Amendment No. 4) Law, 5740-1980, Published in Safer Ha-Chukkim No. 984 of 6 Elul, 5740 (18 August 1980), P. 222, 1980.*

⁶⁰ Jiryès, "Domination by the Law," 81; Shachar, "Whose Republic," 251; Hofnung, *Democracy, Law, and National Security in Israel*, 85.

⁶¹ *Nationality (Amendment No. 2) Law, 5728—1968*, Article 3 added a new section to the original Nationality Law of 1952 and gave it the number 4A which states: "(a) A person who was born after the establishment of the State in a place which was Israel territory on the day of his birth, and who has never had any nationality, shall become an Israel national if he applies for it in the period between his eighteenth birthday and his twenty-first birthday and if he has been an Israel resident for five consecutive years immediately preceding the day of the filing of his application."

⁶² *Nationality (Amendment No. 4) Law, 5740-1980*. This amendment added Section 3A to the Nationality Law of 1952 under the title "Extension of nationality by residence to additional categories of persons." It specifically targeted those who stayed in Israel but never managed to get a citizenship by adding conditions that can only apply to them. First, the citizenship can only be extended for those who was born before the establishment of the state and still was (1) not a resident under another provision of the law (2) used to be a Palestinian citizen before the state was established; (3) was registered as an inhabitant in 1952; (4) was still a resident and (5) was not a national of certain states listed in the Prevention of Infiltration Law. In addition, the law applied to the offspring of the persons mentioned above if they were registered residents as well.

While these amendments solved the problem of most of those who were not displaced, some continued to be stateless.⁶³ But equally importantly it continued on the pattern of preventing all those who were displaced beyond the borders of the state from return.⁶⁴ While the legality of this action will be examined in Chapter 4 of this thesis,⁶⁵ it suffices to stress a number of conclusions based on the law examined above. First, the Israeli legislations have always excluded, with explicit provisions, the granting of Israel's citizenship to Palestinians who were displaced beyond its borders. Secondly, the legislations on nationality (the Law of Return, 1950; and the Nationality Law 1952) are discriminatory. It will be shown in Chapter 3 later that the Israeli law regulating nationality even turned into further discrimination after the year 2000.⁶⁶ In addition to denationalisation as one element that contributed into the durable displacement of the Palestinian refugees, Israel took further measures to guarantee that the refugees will not return. These will be explained in the following section.

2.2.3 The Prevention from Return through Force and Law

It was explained above that according to the accumulative findings of historians researching Israeli official archives and other sources, Israel intentionally displaced Palestinians during the 1948 war. The goal was to reduce the non-Jewish residents, and more importantly, non-Jewish citizens in Israel.⁶⁷

A problem faced by Israel at the early stages of the state, however, was that the borders between Israel and the rest of Palestine, as well as the other Arab countries were not well closed, and a considerable number of refugees attempted to return back to their

⁶³ Jiryes, "Domination by the Law," 81; Shachar, "Whose Republic," 251; Hofnung, *Democracy, Law, and National Security in Israel*, 85.

⁶⁴ Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*, 26; Victor Kattan, "The Nationality of Denationalized Palestinians," *Nordic Journal of International Law* 74 (2005): 85–7; Jiryes, "Domination by the Law," 80; Shachar, "Whose Republic," 250.

⁶⁵ See, Chapter 4 below.

⁶⁶ See, Chapter 3 below, sec. 3.4.2 below.

⁶⁷ See, sec. 2.2.1 above.

cities and villages after the war ended.⁶⁸ To resist this return, Israel took military and legislative steps.

On the military level, Israel adopted several measures to prevent the return of the refugees, as well as the entry of any other Arab across the borders; an act that became known in Israel as “infiltration.”⁶⁹ These actions included, first a “shoot-to-kill” or “free fire” policy at the border lines which took place extensively between 1949 and 1951 but then decreased gradually in the following years.⁷⁰ The army used to also arrest and then deport the returning refugees, and in a number of cases, arrested “infiltrators” were raped and/ or killed.⁷¹ To track those who succeeded in crossing the lines and arriving at their or other villages, the army conducted operations in the Arab villages in Israel, imposed a curfew on them, and attempted to locate the “infiltrators” to arrest and deport them.⁷² Among the specific and immediate goals of these deportations were to prevent the returning refugees from any chance to participate in any census that would later result in acquiring permanent rights, as indicated in the previous section above.⁷³

Simultaneously, Israel’s legal system’s approach was to illegalize the return of the refugees, not only through depriving them from a legal status as mentioned in the previous section above, but also through utilizing and legislating laws that make their unauthorized entry to the country not only illegal, but even criminal. While explaining the provisions of the Nationality Law, Gouldman represented and justified their denationalization by arguing: “Those who crossed to the enemy lines during the War of

⁶⁸ Shachar, “Whose Republic,” 250; Kretzmer, *The Legal Status of the Arabs in Israel*, 37; Benny Morris wrote that tens of thousands have attempted to return to their villages and towns after the exodus in the early fifties. Benny Morris, *Israel’s Border Wars, 1949-1956: Arab Infiltration, Israeli Retaliation, and the Countdown to the Suez War* (Clarendon Press, 1997), 28–31.

⁶⁹ Calling the entry of returning refugees an “infiltration” did not crystallize until 1952, and then became a formal crime in 1954. Alina Korn, “From Refugees to Infiltrators: Constructing Political Crime in Israel in the 1950s,” *International Journal of the Sociology of Law* 31, no. 1 (March 2003): 9.

⁷⁰ Morris, *Israel’s Border Wars, 1949-1956*, 148–84.

⁷¹ Ibid.

⁷² Korn, “From Refugees to Infiltrators,” 18; Jiryes, “Domination by the Law,” 78; Hofnung, *Democracy, Law, and National Security in Israel*, 80–1.

⁷³ Nadia Abu-Zahra and Adah Kay, *Unfree in Palestine: Registration, Documentation and Movement Restriction* (Pluto Press, 2012), 25.

Independence only to infiltrate back again later were not to be rewarded with a grant of Israel nationality.”⁷⁴

However, the problem was not only denationalization, but also deportation, powered by the Israeli legal system. At the early stages, Israel used the British mandate *Immigration Ordinance of 1941*⁷⁵ to deport the returning refugees (who were not registered in the census) considering them illegal.⁷⁶ Then, in 1952, Israel enacted its general *Entry into Israel Law (5712-1952)* according to which it restricted a legal entry into Israel for non-nationals and for those who are not Jewish immigrants with acquiring a visa⁷⁷ and only through “one of the frontier stations.”⁷⁸ Thus, any return of a Palestinian to his/ her village or town without a permit from Israel would be an illegal entry into Israel.

In 1954, the Israeli parliament passed a law, called *The Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954*⁷⁹ (hereinafter Prevention of Infiltration Law) which treated the return of the refugees, as well as any other unauthorized entries into Israel from enemy states (all of the countries bordering Israel in which the refugees sojourned), as serious punishable crimes. According to the law, an infiltrator was:

Anyone who Entered Israel knowingly and unlawfully and who, at any time between November 29, 1947 and his entry was:

1. a national or citizen of the Lebanon, Egypt, Syria, Saudi Arabia, Trans-Jordan, Iraq, or the Yemen; or
2. A resident or a visitor in one of those countries or in any part of Palestine outside Israel [the West Bank and Gaza Strip]
3. A Palestinian citizen or a Palestinian resident without nationality or citizenship or whose nationality or citizenship was doubtful and who, during the said period, left his ordinary place of residence in an area which has become a part of Israel, for a place outside Israel.⁸⁰

⁷⁴ Gouldman, *Israel Nationality Law*, 71.

⁷⁵ Palestine, *Immigration Ordinance of 1944*, OJ 1347 of 20/7/1944, P. 809, 1944.

⁷⁶ Korn, “From Refugees to Infiltrators,” 6.

⁷⁷ *Entry into Israel Law, 5712-1952*, Published in *Sefer Ha-Chukkim No. 111 of the 15th Elul, 5712 (5th September, 1952)*, P. 354, 1952, sec. 1.

⁷⁸ *Ibid.*, sec. 7.

⁷⁹ *The Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954*, *Sefer Ha-Chukkim No. 16, of the 27th Av, 5714 (26th August, 1954)*, P. 160, 1954.

⁸⁰ *Ibid.*

As can be noticed from the wording, the definition is very broad. It explicitly includes Palestinians who were residents in areas that became Israel and “left,” and includes any “resident” or even “visitor” of all the neighbouring countries. Following on the discrimination pattern that was being formed at the early stages of the state, the Infiltration Law only applies to non-Jews because the Jews, whether they were Israeli citizens or not, were entitled to immigration through “return” and easily acquired citizenship.⁸¹

The “infiltrator” was punished with up to five years of imprisonment or paying a fine or both,⁸² and if he had been deported up to seven years or paying a fine or both;⁸³ and with a life sentence if he was armed.⁸⁴ Any person who shelters, aids, or trades with the “infiltrator” was also to be punished with 5 or 15 years depending if he does it for the first time or repeatedly.⁸⁵ This provision made it costly for family members and friends sheltering the returning refugee. Furthermore, the law lays the burden of proof on the infiltrator to prove that he is present lawfully,⁸⁶ and on those who aid, shelter or trade with him to prove that they did not know he was an “infiltrator.”⁸⁷ To weaken the ability of civil judicial review, the law was enacted as an emergency law,⁸⁸ giving the executive authority (in this case the minister of defence) extra-ordinary powers.⁸⁹ For instance, the execution was given to military tribunals, not to civil courts,⁹⁰ and the minister of defence was given the power to deport the “infiltrator,” “whether or not he has been charged

⁸¹ Korn, “From Refugees to Infiltrators,” 7; Alina Korn, “Crime and Legal Control,” *British Journal of Criminology* 40, no. 4 (September 1, 2000): 582.

⁸² *The Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954*, sec. 2.

⁸³ *Ibid.*, sec. 3.

⁸⁴ *The Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954*.

⁸⁵ *Ibid.*, sec. 6–8.

⁸⁶ *Ibid.*, sec. 10.

⁸⁷ *Ibid.*, sec. 9.

⁸⁸ *The Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954*. Article 34 declares this law as a temporary one that would expire at the end of the emergency status. It states: “This Law shall expire when a declaration of the Knesset is published, under section 9(d) of the Law and Administration Ordinance, 5708-1948(6), that the state of emergency has ceased.” However, until today this status has not ceased, and the law is still applicable.

⁸⁹ Korn, “From Refugees to Infiltrators,” 7.

⁹⁰ *The Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954*, sec. 11–29.

under this law” with a retrospective effect, that is, a refugee who returned prior to the enactment of the law can be also deported without charges.⁹¹

Through using all those methods, both military and legal, Israel succeeded in preventing the return of hundreds of thousands of refugees. As expressed by the Israeli professor in criminology, Alina Korn:

By means of various laws (such as the Nationality Law, the Entry into Israel Law, the Prevention of Infiltration Law) that denied those who would be considered a citizen or a legal resident, thousands of refugees that had left the country or were expelled, were turned into infiltrators, criminals and trespassers.⁹²

As noted by Korn, Israel created another discriminatory provision in its law criminalizing not only the return of the refugees to their homes, but even the aid that these refugees receive by their family members. Of course, the policy is discriminatory, since a Jew would not fall under the definition of infiltrator. The legality of Israel’s policy of prevention from return will be examined in Chapter 4.

2.3 The 1967 Refugees

In 1967, another war exploded between Israel, Egypt, Jordan, and Syria in which Israel, the victorious power in the war, occupied lands belonging to or controlled by each of the defeated states, including the West Bank and Gaza Strip.⁹³ Quickly after the occupation, Israel annexed East Jerusalem, and ruled the rest of the occupied territories under military rule, using military orders and courts.⁹⁴

During and immediately after this war, Israel displaced between quarter a million to 450,000 Palestinians from the West Bank (including East Jerusalem) and Gaza Strip,⁹⁵ a

⁹¹ Ibid., sec. 30.

⁹² Alina Korn, “Military Government, Political Control and Crime: The Case of Israeli Arabs,” *Crime, Law and Social Change* 34, no. 2 (September 1, 2000): 162.

⁹³ John Quigley, *The Case for Palestine: An International Law Perspective*, 2nd ed. (Durham & London: Duke University Press, 2005), 161.

⁹⁴ See, Chapter 4, sec. 4.2 below.

⁹⁵ The exact number of those displaced by the war is not known exactly. Soon after the end of the war, the UN Secretary General estimated the number to be almost 255,000 Palestinian displaced persons, in addition to 110,000 Syrians from the occupied Golan Heights. See, U.N. General Assembly, *Report of the Secretary-General Under General Assembly Resolution 2252 (ES-V) and Security Council Resolution 237 (1967)*, September 15, 1967, para. 159, U.N. Doc. A/6797. Also issued under the symbol: S/8158, <http://unispal.un.org/UNISPAL.NSF/0/CC2CFCFE1A52BDEC852568D20051B645>; The Commissioner-General of the UNRWA estimated the number to be 300,000 with 120,000 among them being refugees from the

range amounting between one quarter to one third of the Palestinian population in the West Bank and Gaza then.⁹⁶ These displacements were both within and beyond the borders,⁹⁷ resulting from Israeli army operations during and after the war. The goal of these transfers were first to generally decrease the number of Arabs in the Occupied Territory,⁹⁸ and second to cleanse certain areas of strategic importance from Palestinian population to facilitate a de-facto annexation of these areas into Israel.⁹⁹

This section will show how Israel used similar measures to the ones taken in 1948 to result in a lasting exile to those displaced by the 1967 war. As was the case in the former, the displacement in the latter was a result of 1) the war operations including forced expulsions, 2) prevention from acquiring a legal status to reside in the occupied territory, and 3) prevention from return through regulatory measures.

2.3.1 The War Operations

During and immediately after the war (which lasted only 6 days), Israel conducted several mass expulsions. These forced evictions concentrated on three areas: specific regions that are close to the de facto Israeli-West Bank border, the Jordan Valley and

1948 war displaced for the second time. See, UNRWA, *Report of the Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (1 July 1996- 30 June 1967)* (UN General Assembly, June 30, 1967), para. 1, GA 22nd session official record (30 June 1967). U.N. Doc. A/6713, <http://unispal.un.org/unispal.nsf/181c4bf00c44e5fd85256cef0073c426/2a43e4d980f2c20685256a48004d0424?OpenDocument>; Bailey put the number at 300,000 among them 113,000 refugees who had been displaced in 1948. See, Sydney Dawson Bailey, *The Making of Resolution 242* (Brill Archive, 1985), 94; Janet Abu-Loghod estimated the number to be 300,000 displaced from the West Bank alone, in addition to 25,000-40,000 from Gaza Strip making a total of around 340,000. See, Janet Abu-Lughod, "The Continious Expulsions from Palestine: 1948-1985," in *Palestine: Continuing Dispossession*, ed. Glenn Earl Perry (Association of Arab-American University Graduates, 1986), 32; Masalha puts the number roughly at 320,000. See, Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem*, 178; BADIL human rights organization quoted a number ranging between 400,000- 450,000. See, Badil, Resource Center for Palestinian Residency and Refugee Rights, *Survey of Palestinian Refugees and Internally Displaced Persons 2010-2012* (Beithlehem: BADIL, 2012), xxiii.

⁹⁶ Badil, Resource Center for Palestinian Residency and Refugee Rights, *Survey of Palestinian Refugees and Internally Displaced Persons 2010-2012*, xxvi; Quigley, *The Case for Palestine: An International Law Perspective*, 168.

⁹⁷ U.N. General Assembly, *Report of the Secretary-General Under General Assembly Resolution 2252 (ES-V) and Security Council Resolution 237 (1967)*, para. 40.

⁹⁸ Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem*, 198–90.

⁹⁹ Quigley, *The Case for Palestine: An International Law Perspective*, 178–211; Raja Shehadeh and Law in the Service of Man, *Occupier's Law: Israel and the West Bank*, Rev. ed (Washington, D.C: Institute for Palestine Studies, 1988), 106.

some parts of Jerusalem.¹⁰⁰ In explaining some of the details of the displacements of the war, the United Nations Relief and Works Agency for the Palestine Refugees in the Near East (UNRWA) reported shortly after the war that “the inhabitants fled during the fighting or moved out or were moved out afterwards.”¹⁰¹

During the war, Israel forcibly evicted three villages near the central Latrun area at the western edge of the West Bank, close to the Israeli border, resulting in the displacement of 10,000 civilians.¹⁰² Latroun looks on the map like a finger sticking out the West Bank body, which Israel failed to occupy in the 1948 war.¹⁰³ The villages in the Latroun area continued to be populated until the 1967 war, when Israel forcibly expelled the whole population and demolished every single building.¹⁰⁴ The lands that belong to the Latroun villages were later turned into a park called Canada Park,¹⁰⁵ and an Israeli settlement was also built on part of the lands.¹⁰⁶ In addition, Israel built part of its rail line on another part of the lands from which the refugees were displaced.¹⁰⁷

The evictions of the areas at the edge of the Israel-West Bank borders included more villages and towns. The villages of Bayt Marsam, Bat 'Awa, Habla, Jiftlik and Al-Burj were all destroyed,¹⁰⁸ together with a significant part of the town of Qalqilyah.¹⁰⁹

¹⁰⁰ Usama Halabi, *The Legal Status of Jerusalem and its Arab Citizens*, 2nd ed. (Jerusalem: Institute for Palestine Studies, 1999), 5.

¹⁰¹ UNRWA, *Report of the Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (1 July 1996- 30 June 1967)*, para. 30.

¹⁰² Nur Masalha, *A Land Without a People: Israel, Transfer, and the Palestinians, 1949-96* (Faber and Faber, 1997), 81.

¹⁰³ John Reynolds and Al-Haq, *Where Villages Stood: Israel's Continuing Violations of International Law in Occupied Latroun, 1967-2007* (Ramallah, Palestine: Al-Haq, 2007), 13; Pappé, *The Ethnic Cleansing of Palestine*, 169.

¹⁰⁴ Quigley, *The Case for Palestine: An International Law Perspective*, 159.

¹⁰⁵ Reynolds and Al-Haq, *Where Villages Stood: Israel's Continuing Violations of International Law in Occupied Latroun, 1967-2007*, 29–33; Trish Wood, *Park With No Peace: Canada Park*, 1991, <http://www.youtube.com/watch?v=mcZL-z9fdLA>; Hanna Musleh, *Memory of the Cactus*, 2008, http://www.youtube.com/watch?v=DQ_LjknRHVA.

¹⁰⁶ Reynolds and Al-Haq, *Where Villages Stood: Israel's Continuing Violations of International Law in Occupied Latroun, 1967-2007*, 27.

¹⁰⁷ *Ibid.*, 33–4.

¹⁰⁸ U.N. General Assembly, *Report of the Secretary-General Under General Assembly Resolution 2252 (ES-V) and Security Council Resolution 237 (1967)*, para. 65–72; Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem*, 198.

¹⁰⁹ The UN representative who visited Qalqilya reported citing the mayor of Qalqilya that 850 of the 2000 homes of Qalqilya were demolished. See, U.N. General Assembly, *Report of the Secretary-General Under General Assembly Resolution 2252 (ES-V) and Security Council Resolution 237 (1967)*, para. 54;

Similarly, as soon as Israel controlled the Jerusalem area, it evacuated the Arab residents of the ancient Al-Magharbeh Quarter in the old city and demolished all of their houses leaving them homeless.¹¹⁰ The residence neighbourhood houses were an endowment since the year 1193, and Palestinian families have resided there since then.¹¹¹ Israeli officials saw that the opportunity of the war was one that should be taken advantage of to clear this area and open the space in front of the Western Wall, a holy Jewish site in Jerusalem.¹¹² Similarly, 4000 Palestinians were evicted from the Jewish Quarter of Jerusalem, but the houses were not demolished as the displaced Palestinians were replaced later by Jewish inhabitants.¹¹³

Another area of strategic importance was the Jordan Valley, which is the border between the West Bank and the Hashemite Kingdom of Jordan. During the war, Israel displaced 88% of the population of that area.¹¹⁴ The first to be driven out of the area were refugees who had been displaced from what became Israel in the aftermath of the 1948 war.¹¹⁵ The residents of three refugee camps in the area were all expelled or fled to Jordan, in addition to half of the native population of the area.¹¹⁶

Also in the aftermath of the war, Israel managed to get rid of 200,000 Palestinians by organizing buses departing from Jerusalem and other parts of the West Bank to the borders with Jordan, and forcing those going there to sign a document declaring that they

UNRWA, *Report of the Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (1 July 1996- 30 June 1967)*, para. 30; Masalha argues that Israel had an intention to destroy the whole town of Qalqilya, but it stopped after pressure intervention from "liberal Israeli intellectuals and academics." See, Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem*, 198; John Quigley, "Family Reunion and the Right to Return to Occupied Territory," *Georgetown Immigration Law Journal* 6 (1992): 225.

¹¹⁰ Rashid Khalidi, "The Future of Arab Jerusalem," *British Journal of Middle Eastern Studies* 19, no. 2 (January 1992): 139–40.

¹¹¹ Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem*, 190; Khalidi, "The Future of Arab Jerusalem," 135, 139–40.

¹¹² Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem*, 189–195.

¹¹³ *Ibid.*, 194.

¹¹⁴ *Ibid.*, 203.

¹¹⁵ UNRWA, *Report of the Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (1 July 1996- 30 June 1967)*, para. 30; Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem*, 203; Quigley, "Family Reunion and the Right to Return to Occupied Territory," 225.

¹¹⁶ Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem*, 203.

are leaving the country voluntarily.¹¹⁷ While some of the residents left voluntarily, a former soldier explained that a significant part was forced deportation. He mentioned:

Although there were those deportees who were leaving voluntarily, but there were also not a few people who were simply expelled. We forced them to sign. I will tell you how exactly this was conducted: a bus was arriving and only men were getting off,... We were told that these were saboteurs,... and it would be better that they would be outside the state. They did not want to leave, but were dragged from the bus while being kicked and hit by revolver butts. By the time they arrived to my stall, they were usually already completely blurred at this stage and did not care much about signing. It seemed to them part of the process. In many cases, the violence used against them was producing desirable results from our point of view. The distance between the border point and the bridge was about 100 meters and out of fear they were crossing to the other side running; the border guard men and the paratroopers were all the time in the vicinity. When someone refused to give me his hand [for fingerprinting] they came and beat him badly. then I was forcibly taking his thumb, immersing it in ink and finger printing him. This way the refuseniks were removed... I have no doubt that tens of thousands of men were removed against their will.¹¹⁸

This operation, as noticed by Masalha, has not received much attention,¹¹⁹ probably because it did not involve dramatic military operations and evictions like the case in the Latroun villages or Qalqilya. However, it actually came into public discourse and started to receive attention when Haim Hertzog, who organized this operation after the war while serving as the first military governor of the West Bank, proudly announced in 1991 that he managed to quietly transfer 200,000 Palestinians by using this method.¹²⁰

In conclusion, we can see that the Israeli occupation forces acted upon the desire to, as Masalha expresses it, “thin out”¹²¹ the Palestinian population in the occupied territory. This has resulted in a large number of refugees and internally displaced persons. After the displacement took place, Israel cemented it with some regulatory tools that resulted in sustaining the exile. This will be discussed in the following sections.

¹¹⁷ Ibid., 200.

¹¹⁸ Ibid., 203.

¹¹⁹ Ibid., 201.

¹²⁰ Ibid., 200–1.

¹²¹ Ibid., 188.

2.3.2 Denial from Legal Status

Prior to the occupation of the West Bank (including East Jerusalem) and Gaza Strip, the West Bank had been annexed to Jordan, while the Gaza Strip had been administered by Egypt.¹²² Jordanian law was applicable in the West Bank (including East Jerusalem) and the Palestinians living there were Jordanian citizens.¹²³ In Gaza, however, the Palestinians kept their Palestinian citizenship, and had their own legislative council and laws.¹²⁴

Following its occupation of the West Bank and Gaza, Israel took a census in the OPT, created its own population registry of the inhabitants therein,¹²⁵ and provided those counted by its census with Israeli-issued ID cards.¹²⁶ This new system of registry and identification was the beginning of a new era in the OPT, where only bearers of Israeli identification were allowed to reside in these areas falling under Israeli control.¹²⁷ Raja Shehadeh explained the status given to the West Bank residents as follows:

¹²² As a result of a disagreement among the Arab countries which entered the 1948 war, the result was further division of Palestine under the authorities of Jordan and Egypt. In Gaza Strip, the traditional leadership of Palestine in 1948 declared the whole territory of Palestine as a Palestinian state, and formed the All-Palestine government, which claimed to have jurisdiction over all of Palestine in a step that symbolizes its rejection of the partition of Palestine. As a result, Palestinian institutions were built in Gaza strip, under the supervision of Egypt represented by a military governor who was welcomed by the Gaza population. On the other hand, Transjordan annexed the West Bank, formed the Hashemite Kingdom of Jordan, and automatically granted Jordanian citizenship to all inhabitants of the West Bank. For further details on the first Palestinian statehood declaration and the all Palestine government, A. Shlaim, "The Rise and Fall of the All-Palestine Government in Gaza," *Journal of Palestine Studies* 20, no. 1 (1990): 37–53; See also generally, Muhammad K. Al-Az'ar, *Hukumat 'Umum Filastin Fi Thikraha Al-Khamseen (The All Palestine Government in its Fiftieth Memory)* (Amman: Dar Al-Shurooq, 1999); Quigley, *The Case for Palestine: An International Law Perspective*, 153–4; Raji Sourani, "The Legal System in Gaza Between 1948-1967" (presented at the Which Legal System in Palestine, Birzeit: Birzeit University, 1995), 27–32; Allan Gerson, *Israel the West Bank and International Law* (Routledge, 1978), 76–80.

¹²³ Shehadeh and Law in the Service of Man, *Occupier's Law*, 106; Gerson, *Israel the West Bank and International Law*, 76–80.

¹²⁴ Raja Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories*, CIMEL Book Series 4 (London: Kluwer Law International, 1997), 77; Sourani, "The Legal System in Gaza Between 1948-1967," 27–32; Feras Milhem, "The Origins and Evolution of the Palestinian Sources of Law" (PhD dissertation, Vrije Universiteit Brussel, 2004), 111–126.

¹²⁵ Human Rights Watch, "Forget About Him, He's Not Here:" *Israel's Control of Palestinian Residency in the West Bank and Gaza* (New York, N.Y.: Human Rights Watch, February 2012), 17; HaMoked and B'Tselem, *Families Torn Apart: Separation of Palestinian Families in the Occupied Territories* (Jerusalem: B'Tselem; HaMoked, 1999), 17; HaMoked and B'Tselem, *Perpetual Limbo: Israel's Freeze on Unification of Palestinian Families in the Occupied Territories* (B'Tselem and HaMoked, 2006), 8.

¹²⁶ Order Regarding Identity Cards (Judea and Samaria), No. 234, 1968; Order Regarding Identity Cards and the Population Registry (Judea and Samaria), No. 297, 1969.

¹²⁷ Human Rights Watch, *Forget About Him, He's Not Here*, 5.

Inhabitants of the West Bank are not Israeli citizens. They are holders of Jordanian passports and Israel recognises their nationality as Jordanian in the travel documents it issues to them. Yet, Israel does not recognise that the territory is part of Jordan and does not accord inhabitants of the territories the protection guaranteed under international law to protected persons. As such, they get neither the privileges of citizens of Israel nor those of Jordan. Their status is comparable to that of alien residents.¹²⁸

The status of the residents of Gaza was similar, except that Israel regarded them as stateless.¹²⁹

Unlike the rest of the West Bank, East Jerusalem was annexed to Israel in 1967, and the Israeli law and court jurisdiction was expanded towards it.¹³⁰ The population, however, were not given the status of citizens of Israel upon this annexation, but were rather considered alien residents in Israel.¹³¹ The main difference between the status given to the Jerusalem residents and that given to the rest of the residents of the occupied territory was that Jerusalemites were considered residents of Israel itself, while the rest of the population were considered residents of the “administered territory.”

After the census that Israel conducted, those who were expelled or were away for any other reason, including anyone who went abroad for holiday, studies, work or any other reason (additional 60,000) were not given the status and thus they were not allowed to reside in the Occupied Territory.¹³²

¹²⁸ Shehadeh and Law in the Service of Man, *Occupier's Law*, 106.

¹²⁹ Esther Rosalind Cohen, *Human Rights in the Israeli-occupied Territories, 1967-1982* (Manchester: Manchester University Press, 1985), 36.

¹³⁰ This annexation will be explained in further details in Chapter 4. It suffices here to mention that this annexation took place as a result of the extension of Israel's civil legal system to an assigned area in East Jerusalem, and then expanded its Jerusalem municipality to include the annexed part. See, *Law to Amend the Legal and Judicial Jurisdiction of the State of Israel*, 1967; Later in 1980 Israel introduced a Basic Law (which holds a constitutional value) declaring that unified Jerusalem is the Capital of Israel. *Basic Law: Jerusalem, Capital of Israel*, Published in *Sefer Ha-Chukkim No. 980 of 5th August, 1980*, P. 186, 1980.

¹³¹ HCJ, 282/88 - 'Awad v Yitzhak Shamir, Prime Minister and Minister of Interior et al. Judgment, 9 (HCJ 1988), Stating that the residents of East Jerusalem were given a permanent residency permit. Nahedh Rayyes, *Quds Bayna Zayf Al-Qanoun Al-Isra'eli wa Ajz al-Qanoun Al-Duwali* (Gaza: Al-Lajna Al-Wataniyya Al-Ulya Lil-Quds Asimat Al-Thaqafa Al-Arabiyya 2009, 2009), 42; Leah Tsemel, “Continuing Exodus - The Ongoing Expulsion of Palestinians from Jerusalem,” *The Palestine Yearbook of International Law* 9 (1997 1996): 42.

¹³² HaMoked and B'Tselem, *Families Torn Apart: Separation of Palestinian Families in the Occupied Territories*, 17; Human Rights Watch, *Forget About Him, He's Not Here*, 5; Quigley, “Family Reunion and the Right to Return to Occupied Territory,” 226.

To conclude, we can compare between this policy and that of 1948 to easily notice that Israel almost duplicated its pattern. As soon as it controlled a territory, it guaranteed that those who had been displaced by the war, or who were simply outside the borders, would be excluded from any right to reside in their homes, effectively making their exile durable.

In addition to the expulsion and prevention from residency rights further measures to prevent return. These will be studied in the next section.

2.3.3 Prevention from Return

Similar to the aftermath of 1948, in 1967 those who were displaced by the war also tried to return to their homes. To combat this expected phenomenon, Israel issued military orders that consider any unauthorized entry to the occupied territory illegal. The regulatory measures introduced by Israel for this goal have been understudied, so this section will depend mainly on primary material.

The Israeli regulatory action to prevent return started as early as August and September 1967, when the Israeli military authorities in both the West Bank and Gaza Strip issued orders to prevent “infiltration” in the occupied territory. The first order, issued on 23 August 1967 defined the infiltrator as: “a person who entered the Area [i.e. West Bank] knowingly and unlawfully after having been present in the east bank of the Jordan [river], Syria, Egypt or Lebanon.”¹³³ The order defined the word lawfully: “as per permit by the military commander or a person appointed by him,”¹³⁴ and punished the “infiltrator” by “imprisonment of fifteen years or a fine of 10,000 Israeli Lira or both.”¹³⁵ This order was made effective retrospectively by an “effective date,” which is June 7th 1967, i.e. two days after the beginning of the war.¹³⁶ The punishment in this first order did not include deportation. A similar order was issued for Gaza Strip, but the effective date of

¹³³ *Military Order Regarding Prevention of Infiltration (West Bank) (No. 106), of 5727, 1967.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

applicability for this order was June 6th, 1967, and it also considered entering Gaza after staying in the West Bank as infiltration.¹³⁷

One month later, the army commander issued an order introducing deportation. Section 5 (A) of Order 125 stated:

The commander of the Israeli Defence Forces or whoever he assigns may order, in writing, the deportation of an infiltrator, whether charged with an offence under this Order or whether not charged and the deportation order shall serve as the legal source for holding such infiltrator in custody pending his deportation.¹³⁸

The new order which replaced Order 106 also introduced an additional difficulty to those to be deported; it laid the burden of proof on the accused of infiltration, by providing:

In any judicial proceeding under this Order, a person who is present in the Area without a document which allows his identification as a resident of the Area bears the burden of proving that he did not enter the area knowingly and unlawfully after 7 June 1967.¹³⁹

Thus, according to this article, any person who does not hold an Israeli permit is considered illegally present and is eligible for deportation, with a retrospective effect from the second day after the war started. In December, the military commander presented an additional amendment to order 125, by which he considered any person who entered the Area “legally” but whose permit expired an “infiltrator.”¹⁴⁰

In 1969, the military commanders of both the West Bank and Gaza Strip issued two similar orders that include all the principles described above, but added that “[a] person who entered the Area after the effective date [i.e. 7/6/1967 for the West Bank and

¹³⁷ *Military Order Regarding Prevention of Infiltration (Gaza Strip and Northern Sinai) (No. 82) for 5727, 1967.*

¹³⁸ *Military Order Regarding Prevention of Infiltration (West Bank) (No. 125), of 5727, 1967.*

¹³⁹ *Ibid.*, sec. 4.

¹⁴⁰ *Military Order Regarding Prevention of Infiltration (West Bank) (Amendment No. 1) (No. 190) of 5782, 1967.*

6/6/1967 for Gaza Strip^{141]} as per permit that was obtained on the basis of a false affidavit is considered an infiltrator."¹⁴²

The Israeli courts did not challenge the legality of these orders that effectively decreased the population of the occupied territory. For example, in a petition to the Israeli Supreme Court in 1984, an imprisoned Palestinian from Gaza who was also subject to a deportation order requested that the court annuls the deportation order.¹⁴³ The petitioner actually proved that he participated in the census taken in September 1967,¹⁴⁴ but had stated to interrogators when arrested in 1967 that he returned to Gaza after the war had begun (after the effective date) coming back from Saudi Arabia where he had been studying pharmacy (although he later denied that he entered after the effective date).¹⁴⁵ The court, noting that Gaza was declared a closed military zone from 8 June 1967, and that he must have returned "illegally," dismissed his request not to be deported and held:

From the moment it was determined that the petitioner resided in Jordan and Syria after 6/6/1967 and then he crossed the River Jordan deliberately and unlawfully in order to enter Judea and Samaria [i.e. West Bank], Israel and Gaza, from the date he entered Judea and Samaria and then the Gaza Area he should be viewed as an infiltrator as defined in the security legislation on the matter. The authority to issue a deportation order against him derives from his act of infiltration.¹⁴⁶

¹⁴¹ HCJ 159/84, Abdul Aziz Ali Shaheen vs. the IDF Commander in the Gaza Strip Area, Piskei Din (Judgments of the Supreme Court of Israel), vol.39, part1, at 309-336 (1985), Translated to English and published in 3 Pal. Y.B. Int'l L. 114, 1986, 113 (Israeli Supreme Court 1985), Stating that the effective date in Gaza is 6/6/1967.

¹⁴² Military Commander for the Judea and Samaria, *Military Order Regarding Prevention of Infiltration (Judea and Samaria)*(No.329), 5729, 1969, English Translation is presented by HaMoked, available at: http://www.hamoked.org/files/2010/112300_eng.pdf; *Military Order Regarding Prevention of Infiltration (Gaza Strip and Northern Sinai) (No. 290)* for 5729, 1969.

¹⁴³ HCJ 159/84, Abdul Aziz Ali Shaheen vs. the IDF Commander in the Gaza Strip Area, Piskei Din (Judgments of the Supreme Court of Israel), vol.39, part1, at 309-336 (1985), Translated to English and published in 3 Pal. Y.B. Int'l L. 114, 1986 (Israeli Supreme Court 1985).

¹⁴⁴ *Ibid.*, para. 3.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*, para. 4.

The court provided later “... the fact that a person had in the past been a resident of the area and willingly left before the beginning of the IDF rule, did not grant him an automatic right to return.”¹⁴⁷

Then it addressed the issue of him having not established a permanent residence elsewhere in the world by holding:

even if a person left the area before the entrance of the IDF forces and did not establish another place of residence, but made a temporary visit to one of the Arab countries, which were at that time in a state of war with Israel, this would restrict the right of re-entry to the area and make it conditional upon the receipt of a legal permit.¹⁴⁸

Then, the court held that “participation in the census did not alter the petitioner’s status as an infiltrator”¹⁴⁹ and that the mere participation in the census “does not make a person who participated in it a legal resident of the area.”¹⁵⁰

What can be concluded from the analysis of this case is that any unauthorized entry into the West Bank or Gaza is considered an “infiltration,” which on its own is enough to deport the alleged “infiltrator,” regardless of whether he was counted in the census, or given the residency status that Israel gave to the population. As explained by the court, the military regime in the West Bank and Gaza did not recognize the right of one to reside in the West Bank only on the basis that he had been a resident before the occupation started. Thus, the “prevention of infiltration” military orders formed an additional effective tool in not only preventing the return of those displaced by the war, but also in deporting people who managed to participate in the census. The further developments of the “infiltration” military orders will be discussed in Chapter 3 in order to explain contemporary displacements,¹⁵¹ and the legality of this policy will be examined in Chapter 4.

It remains essential to stress in conclusion of the last three subsections that Israel used military force and regulatory tools in order to create a sustainable exile for one third

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ See, Chapter 3, sec. 3.6 below.

of the population of the West Bank and Gaza.¹⁵² The problem of the displaced persons remains unresolved until the current day.¹⁵³

2.4 Conclusion: the Characteristics of the Displacements in both Wars

This chapter has analyzed some aspects of Israel's forced displacement policy against the Palestinian inhabitants of areas that fell under its sovereignty, as well as the OPT. It can be noticed from the facts presented above that Israel has used almost identical tools to inflict a durable displacement upon its victims. While it took advantage of the two wars to displace hundreds of thousands of Palestinians, the political establishment further innovated a number of regulatory methods to cement the displacement and inflict new deportations. These methods included, first, excluding the displaced persons from the right to return to their homes by denying them a legal status that allows them to do so. This took place by excluding the Palestinian refugees in 1948 from Israel's citizenship and creating a new residency status in the OPT that the residents of the West Bank including East Jerusalem and Gaza were not entitled to. Furthermore, Israel legislated a *Prevention of Infiltration law* in 1948 and issued military orders to the same effect in 1967 that not only illegalized the attempted unauthorized return of the refugees, but even criminalized it. The Israeli political establishment's use of its legal system to inflict and cement displacement means that its policy of displacement is systematic.

Furthermore, these laws and regulations were only inflicted upon Palestinians. The Jewish population who resided in Israel and the OPT did not suffer from these policies. Hence, the systematic displacement can be also described as discriminatory.

Finally, it should be noted that the motive behind these displacements was to minimize the number of Palestinians, based on an ideological motive to change the demographic structure of the areas that fall under Israeli jurisdiction to tilt in favour of a Jewish majority.

¹⁵² Badil, Resource Center for Palestinian Residency and Refugee Rights, *Survey of Palestinian Refugees and Internally Displaced Persons 2010-2012*, xxvi.

¹⁵³ See, Chapter 5, sec. 5.1 below.

Chapter 3- Continuous Displacement: Status Engineering

3.1 Introduction

In the previous chapter, it was explained how Israel engineered the regulations concerning personal legal statuses in order to guarantee that the displacement of the refugees who were displaced during the 1948 and 1967 wars would be irreversible. The tools used for this purpose were preventing those who were displaced by the war from receiving any legal status in Israel or the OPT and introducing the “prevention of infiltration” law in Israel and military orders in the West Bank and Gaza Strip to guarantee the prevention of the refugees’ return.

Despite the end of the war, status revocations and limitations continued to play an important role in displacing Palestinians, especially after the 1967 occupation. This chapter aims at explaining how status limitations and revocations have resulted in the forcible displacement of hundreds of thousands of Palestinians until now, and how Israeli policies continue to pose a serious threat on large segments of the Palestinian population in Israel and the OPT. This chapter has been divided into seven subsections explaining the main regulatory methods used to inflict status limitations and revocations. These subsections will explain status revocation, family unification and child registration issues in Jerusalem, the West Bank, and Gaza Strip; as well as the prohibition of address change between the West Bank and Gaza Strip. At the end, this chapter will discuss Israel’s recent expansion of the prevention of infiltration military order.

The subdivisions in this chapter are governed by the legal distinctions set by Israel itself. Although the West Bank, Gaza Strip and East Jerusalem have the same international legal status as will be explained further in Chapter 4, this chapter will explain the status

revocation and deprivation methods employed therein in separate sections. As will be shown below, the legal framework that Israel has used in annexed East Jerusalem is fundamentally different from the one it used in the West Bank and Gaza.

3.2 Status Revocations in the West Bank and Gaza Strip

Shortly after the occupation of the West Bank including East Jerusalem and Gaza Strip, Israel took a census in the occupied Palestinian territory (OPT) and then gave those who were present Israeli-issued Identity Documentation cards (ID cards).¹ These cards documented one's name, date of birth and address, among other details,² and were issued in three general categories and colors: blue in East Jerusalem, orange in "Judea and Samaria" (this is the name Israel gives to the West Bank excluding Jerusalem) and red in Gaza Strip.³ These three categories and colours indicated the different legal statuses that were given to the Palestinians.

The military law Israel established in the OPT gave bearers of Israeli-issued ID cards to enter and "legally" reside in their homes, but denied this right to other Palestinians who were not registered in the newly established population registry and did not receive such ID cards.⁴ The Israeli-issued ID cards became the main document used by the Palestinians to identify themselves to the Israeli authorities. Since the beginning of the occupation, it has been a legal requirement to carry these cards at all times,⁵ and they were needed for movement within the occupied territories, to Israel or to travel abroad.

¹ Human Rights Watch, *"Forget About Him, He's Not Here:" Israel's Control of Palestinian Residency in the West Bank and Gaza* (New York, N.Y.: Human Rights Watch, February 2012), 17; HaMoked and B'Tselem, *Families Torn Apart: Separation of Palestinian Families in the Occupied Territories* (Jerusalem: B'Tselem; HaMoked, 1999), 17; HaMoked and B'Tselem, *Perpetual Limbo: Israel's Freeze on Unification of Palestinian Families in the Occupied Territories* (B'Tselem and HaMoked, 2006), 8.

² *Order Regarding Identity Cards (Judea and Samaria), No. 234, 1968; Order Regarding Identity Cards and the Population Registry (Judea and Samaria), No. 297, 1969.*

³ A. Khalil, "Palestinian Nationality and Citizenship: Current Challenges and Future Perspectives," *European University Institute Robert Schuman Centre for Advanced Studies CARIM Research Report no. 2007/7* (2007): 5, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1559205.

⁴ Human Rights Watch, *Forget About Him, He's Not Here*, 17; Khalil, "Palestinian Nationality and Citizenship," 5.

⁵ *Order Regarding Identity Cards and the Population Registry (Judea and Samaria), No. 297, Article 4.*

In the case of traveling abroad via Jordan or Egypt through the land crossings (Alenby Bridge to Jordan, and Rafah Crossing to Egypt), the Palestinians (from both the West Bank including East Jerusalem and Gaza Strip) had to leave their ID cards at the border crossing and take instead an exit permit valid for a specified period of time.⁶ Similarly, if the traveler left through one of the Israeli border crossings, including the Ben-Gurion Airport, they had to hand in their ID card, and leave using their Israeli-issued “laissez-passer,” or travel document, which consists of a visa valid for one year.⁷ If the traveler missed the deadline stated on his permit or visa, he would be denied entry and consequently lose his residency status, which would be considered by the Israeli military authorities “ceased residency status.”⁸ Similarly, Al-Haq documented that residency status was also revoked when a Palestinian acquired a permanent residency status or a citizenship abroad.⁹

Between 1967 and 1995, according to the Israeli army’s responses to HaMoked’s applications based on the Freedom of Information Act, 140,000 Palestinians from the West Bank (not including East Jerusalem) and 108,878 Palestinians from Gaza Strip have lost their residency status as a result of this policy.¹⁰

⁶ Human Rights Watch, *Forget About Him, He’s Not Here*, 18–19; HaMoked and B’Tselem, *Perpetual Limbo*; Rafah Crossing between Gaza Strip and Egypt was only opened in 1982 for the traveling of Gazans to Egypt. The procedure in Rafah did not at all times include the Palestinian leaving his ID card at the border crossing. Nonetheless, it was always a requirement that a Palestinian needs to get a time limited exit permit. The expiry of such permit before its bearer’s return means the expiry of the bearer’s residency. Information acquired through an e-mail exchange with the Palestinian Center for Human Rights in Gaza Strip, Khalil Shaheen to Munir Nuseibah, “E-mail by the Palestinian Center for Human rights, re. Rafah Crossing,” April 15, 2012.

⁷ Candy Whittome, *The Right to Unite: The Family Reunification Question in the Palestinian Occupied Territories: Law and Practice* (Ramallah, Palestine: Al-Haq, January 1, 1990), 12, <http://www.alhaq.org/publications/publications-index/item/the-right-to-unite-the-family-reunification-question-in-the-palestinian-occupied-territories-law-and-practice>.

⁸ The first time Israel admitted this policy was quite recently. Only in March 2011, the Israeli human rights organization, HaMoked, received official information about this policy, following a petition it filed in the Supreme Court requesting this information. See, Omer Knobler to HaMoked, center for the Defence of the Individual and Ido Bloom, “AdmPet 28741-02/11 HaMoked: Center for the Defence of the Individual v. Coordinator of Government Activities in the Territories et al. -Demand for information regarding ‘inactive’ status for Palestinian Residents,” March 30, 2011, Hamoked provides inofficial English Translation, available at: http://www.hamoked.org/files/2011/114221_eng.pdf.

⁹ Whittome, *The Right to Unite*, 12.

¹⁰ Knobler to HaMoked, center for the Defence of the Individual and Bloom, “COGAT’s Resonse to HaMoked regarding ‘inactive’ status”; Guy Inbar to Ido Bloom and HaMoked, center for the Defence of the Individual, “Response to your application under the Freedom of Information Act on the issue of deportation

When Israel revoked residencies according to this procedure, it did not inform the victims about its will to revoke their residencies. Simply, when they returned to the country, they discovered they were not allowed to return as their residency had been revoked. One woman interviewed by Human Rights Watch described how she lost her status:

It turned out I was supposed to come back and renew my exit permission within six months. I missed the appointment and they cancelled me, but I did not know about the requirement. There was nothing I could do about it. Every time I came back to Gaza after that, I had to get a visitor's permit beforehand.¹¹

Israel publicly referred to this policy for the first time in a letter to the Israeli human rights organization, Hamoked, only in 2011, following the latter's litigation in the Israeli Supreme Court requesting information. The letter explained:

A resident who did not return was registered as having 'ceased residency' status since he was viewed as a person who had transferred his centre of life abroad.¹²

According to the same letter, Israel has re-activated the residency of 10,000 West Bank Palestinians who had been given the "ceased residency" status, rendering 130,000 and their families permanently displaced due to this technical method of displacement.¹³

This procedure was used at the borders for residents of the West Bank and Gaza until 1995, when the Palestine Liberation Organization (PLO) assumed some limited transitional authority in the OPT following the interim peace agreement with Israel. This agreement gave the newly established Palestinian authority some shared responsibility over the population registry, allowed Palestinians in the West Bank and Gaza to travel using passports, and ended the procedure according to which Israel revoked residencies due to extended stays abroad.¹⁴ By sharing the PLO with responsibility over the Palestinian population registry, some protection (although limited) was introduced to the

and revocation of residency in the Judea and Samaria Area and in the Gaza Strip," Response to application under the Freedom of Information Act, June 10, 2012, Unofficial English Translation is provided by Hamoked, available at: http://www.hamoked.org/files/2012/155760_eng.pdf.

¹¹ Human Rights Watch, *Forget About Him, He's Not Here*, 19.

¹² Knobler to HaMoked, center for the Defence of the Individual and Bloom, "COGAT's Resonse to HaMoked regarding 'inactive' status."

¹³ Ibid.

¹⁴ Israel and Palestine Liberation Organization, "Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip" (Washington, D.C., September 1995), Annex III, Appendix I, Article 28 (2). HaMoked and B'Tselem, *Families Torn Apart: Separation of Palestinian Families in the Occupied Territories*, 95.

Palestinian residency status in the OPT. This limited protection did not include East Jerusalem, which will be discussed in the next section.¹⁵

However, most of those who had been displaced as a result of residency revocation in the West Bank and Gaza prior to the peace process were not provided with remedies. In the early 1990s, before the Interim Peace Agreement, Israel had established a committee in the military government called “latecomers committee” that received appeals from those whose residencies were revoked.¹⁶ This committee dealt with these applications according to confidential procedures and took its decisions without allowing the applicant or his lawyer to appear or argue his case in front of it.¹⁷ When these applications are refused, the last resort for the deportee and his family is to apply for family unification, a very problematic and usually unsuccessful application.¹⁸ The predicament of family unification will be discussed further in section 3.4.1 below.

Then in 1995 the Interim Peace Agreement was signed. Regarding past residency revocations, it was agreed that

A joint committee will be established to solve the reissuance of identity cards to those residents who have lost their identity cards.¹⁹

This committee spent several years in political negotiations with no success, apparently due to Israeli obstacles during the negotiations.²⁰ This left the issue of almost

¹⁵ See sec. 3.3 below.

¹⁶ Badil, Resource Center for Palestinian Residency and Refugee Rights and Alternative Information Center, “‘Lost IDs’ on the Agenda Now,” *Article 74*, December 1994, <http://www.badil.org/en/article74/item/643-%E2%80%99Lost-ids%E2%80%9D-on-the-agenda-now>; HaMoked and B’Tselem, *Families Torn Apart: Separation of Palestinian Families in the Occupied Territories*, 95–6.

¹⁷ HaMoked and B’Tselem, *Families Torn Apart: Separation of Palestinian Families in the Occupied Territories*, 18; Nadia Hijab, *Women Are Citizens Too: The Laws of the State, the Lives of Women* (United Nations development programme (UNDP). Regional Bureau for Arab States (RBAS), 2002), 15, http://www.ecoi.net/file_upload/1158_1195825211_lives-of-women.pdf.

¹⁸ Whittome, *The Right to Unite*, 11–6; HaMoked and B’Tselem, *Families Torn Apart: Separation of Palestinian Families in the Occupied Territories*, 18.

¹⁹ Israel and Palestine Liberation Organization, “Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip” Annex 1, Appendix III, Article 28 (3).

²⁰ HaMoked and B’Tselem reported that Israel first denied that this application was actually designed to return revoked residencies, and claimed that the point was to print new cards for those who physically lost their ID cards. When this argument was later resolved, the parties spent plenty of time trying to agree on the criteria that should be used in deciding the cases. See, HaMoked and B’Tselem, *Families Torn Apart: Separation of Palestinian Families in the Occupied Territories*, 96.

quarter a million Palestinians in the West Bank and Gaza and their families unresolved, and in need of a remedy.

3.3 Residency Status Revocations in East Jerusalem

Up until the Interim Peace agreement, the residency revocation policies applied in East Jerusalem on the one hand and the West Bank and Gaza on the other were similar in their effect, although the regulatory framework and instruments were different due to the annexation of East Jerusalem in 1967. The similarities included several details. For example, East Jerusalem residents also needed exit permits to travel abroad, had to leave their ID cards at the land crossing to Jordan, travelled through the airport using a “laissez-passer” with a return visa stamped on it and got their residencies revoked upon returning later than the date stated on their permits.²¹ Nonetheless, there are major differences in the way Israel treated Jerusalemites, which need to be discussed in this separate subsection.

This difference is due to Israel’s extension of the geographical jurisdiction of its domestic law towards the annexed part of Jerusalem.²² This practically meant that the military orders issued in the West Bank did not apply in Jerusalem. In addition, the status that the Palestinians in Jerusalem received was an Israeli status. Despite the annexation, however, Israel did not grant citizenships to the residents of the annexed territory, but considered them alien residents in Israel.²³

Residency status in Israel is regulated with the Entry into Israel Law (1952), which gives the Minister of the Interior, “at his discretion,” the authority to “cancel any permit of residence.”²⁴ Prior to the beginning of the peace process, the general Israeli policy adopted by the ministry of the interior, expressed in its own regulations, was that a

²¹ Whittome, *The Right to Unite*, 11–2; HaMoked, B’Tselem, and Yael Stein, *The Quiet Deportation: Revocation of Residency of East Jerusalem Palestinians* (B’Tselem; HaMoked, 1997), 12–3.

²² *Law to Amend the Legal and Judicial Jurisdiction of the State of Israel*, 1967.

²³ Nahedh Rayyes, *Quds Bayna Zayf Al-Qanoun Al-Israeli wa Ajz al-Qanoun Al-Duwali* (Gaza: Al-Lajna Al-Wataniyya Al-Ulya Lil-Quds Asimat Al-Thaqafa Al-Arabiyya 2009, 2009), 43; Leah Tsemel, “Continuing Exodus - The Ongoing Expulsion of Palestinians from Jerusalem,” *The Palestine Yearbook of International Law* 9 (1997 1996): 42.

²⁴ *Entry into Israel Law, 5712-1952, Published in Sefer Ha-Chukkim No. 111 of the 15th Elul, 5712 (5th September, 1952), P. 354, 1952, Article 11(a)(2).*

resident would lose his residency status in a number of conditions, including if he “left Israel and settled in a country outside Israel.”²⁵ The regulations clarified that this condition (settling outside Israel) would be fulfilled by leaving Israel for a period of 7 years; receiving a permanent residency permit in another country; or receiving citizenship of that country through naturalization.²⁶

Prior to the peace process, Jerusalemite Palestinians travelled abroad and returned to visit Jerusalem to renew their exit permits or travel documents, and the authorities renewed their permits regularly.²⁷ When they resided in suburbs of Jerusalem that were not annexed by Israel, or in any other part of the OPT, their residencies were secure as they were not considered to have settled abroad.²⁸

Shortly after the launch of the peace process in 1995 Israel surprised Palestinian Jerusalemites with a new policy of residency revocations without warning. Suddenly, Jerusalemites who were residing in the West Bank or Gaza, as well as those who lived abroad, started facing residency revocations without being informed about the regulations used for such revocations.²⁹ This was the beginning of a new era in the interpretation of Israel’s Entry into Israel Law and regulations, characterized by a sudden broadening of the definition of “settling outside Israel” using the stricter criterion called “centre of life.”³⁰ According to the new policy, a Palestinian would be considered to have

²⁵ *Entry into Israel Regulations* (1974), 1974, Article 11 (C).

²⁶ *Ibid.*, Regulation 11a. An unofficial translation to English is provided by Hamoked, available at: <http://www.hamoked.org/files/2010/regulation%2011a.pdf>.

²⁷ HaMoked, B’Tselem, and Stein, *The Quiet Deportation: Revocation of Residency of East Jerusalem Palestinians*, 13.

²⁸ *Ibid.*

²⁹ *Ibid.*, 12, citing a letter sent from the legal department in the Ministry of Interior to HaMoked in 1994 stating that “the Minister of Interior has broad discretion in granting approvals/permits, and he is not required to state reasons for his decision... Because he has no duty to state reasons, there is also no cause to issue internal directives to assist in exercising the said discretion”; Tsemel, “Continuing Exodus - The Ongoing Expulsion of Palestinians from Jerusalem,” 43–5.

³⁰ Tsemel, “Continuing Exodus - The Ongoing Expulsion of Palestinians from Jerusalem,” 44; HaMoked, B’Tselem, and Yael Stein, *The Quiet Deportation Continues: Revocation of Residency and Denial of Social Rights of East Jerusalem Residents* (B’Tselem, HaMoked, 1998), 8; John Quigley, “Jerusalem: The Illegality of Israel’s Encroachment,” *Palestine Yearbook of International Law* 9 (1997 1996): 34; The Civic Coalition for Palestinian Rights in Jerusalem, *43 Years of Occupation: The Jerusalem File (second Edition)*, 2nd ed. (Jerusalem: Civic Coalition for Palestinian Rights in Jerusalem, 2011), 17, <http://www.civicoalition-jerusalem.org/human-rights-resources/publications/reports/43-years-occupation-jerusalem-file-second-edition>.

“settled outside Israel” if his “*centre of life*” was outside Israel. This had two significant practical applications. First, those who moved to areas beyond Jerusalem’s municipal borders towards the West Bank (including Jerusalem’s suburbs) or Gaza Strip got to be considered to have moved their “centre of life” outside Israel.³¹ Secondly, those who had travelled abroad for extended periods of time were considered to have moved their “centre of life” and became liable to residency revocations.³² The burden of proving that one’s “centre of life” is in Israel has been laid on the Palestinians, who have been asked to provide documents that prove their residence.³³

The revocable residency status given to the residents of Jerusalem and the stricter regulations that led to thousands of residency revocations were examined, approved and in part developed by the Israeli Supreme Court. In 1988, the Israeli Supreme Court declined a petition filed by Dr. Mubarak Awad, a Palestinian academic who headed the Centre for the Study of Non-Violence, and vocally called for resisting the Israeli occupation non-violently.³⁴ Awad, who was born in Jerusalem in 1943, was counted in the census of 1967 and was given the residency that the rest of the population of Jerusalem was given.³⁵ He travelled to study in the United States in 1970 and stayed for a period of time during which he got a permanent residency status in the USA and later a citizenship.³⁶ During one of his visits to his home, he applied to renew his ID card but the Israeli ministry of Interior declined his application based on the argument that he lost his residency status.³⁷

³¹ Usama Halabi, “Legal Status of the Population of East Jerusalem Since 1967 and the Implications of Israeli Annexation on Their Civil and Social Rights,” in *43 Years of Occupation: Jerusalem File*, ed. Civic Coalition, 2nd ed. (Jerusalem: Civic Coalition for Palestinian Rights in Jerusalem, 2011), 17; Tsemel, “Continuing Exodus - The Ongoing Expulsion of Palestinians from Jerusalem,” 43; Natalie Tabar and Grazia Careccia, *The Jerusalem Trap* (Al-Haq, 2010), 14; HaMoked, B’Tselem, and Stein, *The Quiet Deportation Continues: Revocation of Residency and Denial of Social Rights of East Jerusalem Residents*, 8.

³² Halabi, “Legal Status of the Population of East Jerusalem Since 1967 and the Implications of Israeli Annexation on Their Civil and Social Rights,” 17.

³³ HaMoked, B’Tselem, and Stein, *The Quiet Deportation: Revocation of Residency of East Jerusalem Palestinians*, 15.

³⁴ Yossi Wolfson, “Revocation of Permanent Status from East Jerusalem Residents: HCJ 282/88 ‘Awad V. Shamir (judgment Dated June 5, 1988),” *HaMoked*, May 2012, <http://www.hamoked.org/Document.aspx?dID=Documents1317>.

³⁵ HCJ, 282/88 - ‘Awad v Yitzhak Shamir, Prime Minister and Minister of Interior et al. Judgment, 1 (HCJ 1988).

³⁶ *Ibid.*

³⁷ *Ibid.*, para. 2.

Justice Aharon Barak, who wrote the judgment, declined the argument of the petitioner's council, which claimed that the Entry into Israel law should not apply to the residents of Jerusalem and that these residents should be given a protected status such as a "constitutional residency" or a "quasi citizenship."³⁸ Justice Barak's judgment did not challenge the legality of the revocable residency status given by Israel and found that the application of the Entry into Israel law was appropriate. Justice Barak then discussed the "expiry" of the permanent residency status. He wrote:

Can a permit for permanent residency expire "of itself" without an act of revocation by the minister of interior? I believe the answer to this is affirmative. A permit for permanent residency, when granted, is based on reality and permanent residency. Once this reality no longer exists, the permit expires of itself.³⁹

Through this opinion, the Israeli Supreme Court declined to protect the population of East Jerusalem and their right not to be deported from their city, and insisted that treating them like immigrants was appropriate. The judgment added:

Indeed, a permit for permanent residency- as opposed to the act of naturalization- is a hybrid. On the one hand, it has a constituting nature, creating the right to permanent residency; on the other hand, it is of a declarative nature, expressing the reality of permanent residency. Once this reality disappears, the permit no longer has anything to which to attach, and is, therefore, revoked of itself, without any need for a formal act of revocation.⁴⁰

The judgment also made a vague reference to the concept of "centre of life," which was later developed into the policy explained above. The judgment stated, after explaining that Awad had lived in the USA and acquired an American citizenship:

This new reality reveals that the petitioner uprooted himself from the country [i.e. Israel] and rooted himself in the USA. His *centre of life* is no longer the country, but the USA. [Emphasis added]⁴¹

In 1994, another key judgment was made by Israel's Supreme Court. The petitioner Fathiyya Shiqaqi, whose husband had been deported to Lebanon and then moved from there to Syria, followed him and stayed in Syria for 6 years.⁴² Unlike Mubarak Awad, she received neither a permanent residency status nor a citizenship abroad.⁴³ When she

³⁸ Ibid., para. 9.

³⁹ Ibid., para. 14.

⁴⁰ Ibid.

⁴¹ Ibid., para. 15.

⁴² HCJ 7023/94, Fathiyya Shiqaqi vs. Minister of Interior (HCJ 1995).

⁴³ Ibid.

returned to Jerusalem, she went to the ministry of interior to register her three children, but her application was refused and she was told she had to leave the country.⁴⁴

Obviously, she argued that the regulations written by the ministry of the interior itself defined residing outside the country, in relation to terminating residencies, as residing in another country for 7 years and receiving a permanent residency or a citizenship of that country. None of these conditions was fulfilled by Mrs. Shiqaqi's stay abroad, which, as her council argued, makes the revocation of her residency status illegal under Israeli law.⁴⁵ Moreover, she never left the country as a result of her own will.⁴⁶ Had her husband not been deported she would have not left the country.

The court, surprisingly then, found that the three options for residency "expiry" enlisted by the law could be expanded, giving a much wider space for residency revocation. The judgment stated:

It cannot be said that only where one of the enumerated facts apply can settlement in a foreign country under regulation 11(c) be proved. Settling in a foreign country can also be found in ways other than those enumerated in 11A of the aforementioned regulations. The appearance of a new reality, changing the reality of permanent residency in Israel, is clearly indicated by circumstances other than those mentioned in regulation 11A of the said regulations.⁴⁷

This case was a pivotal point in expanding Israel's criteria for revoking Palestinians' residencies in Jerusalem and expelling them. Its timing was also critical, as it was decided simultaneously with the beginning of Israel's policy of mass revocation of residencies of those residing in the West Bank, Gaza or abroad, since their centre of life was not Jerusalem. Since then, it became the responsibility of the Palestinian in Jerusalem every time he sought to renew his documents, register a child, change his marital status, etc, to prove that he/ she still resides in Jerusalem.

The Supreme Court's decisions in this topic have been seen as a contribution in the regulatory engineering aiming at displacing Palestinians. Advocate Yossi Wolfson of HaMoked ironically comments on the Awad case:

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.; The text is translated into English in Hamoked's report. HaMoked, B'Tselem, and Stein, *The Quiet Deportation: Revocation of Residency of East Jerusalem Palestinians*, 6–7.

There you have it, a perfect geometric structure: An abstract legal fixture – a permanent residency permit – with a built in self-destruct mechanism. Upon fulfilment of the conditions pre-programmed into the permit, it revokes itself without human intervention.⁴⁸

According to the numbers provided by the Israeli ministry of Interior, between 1967 and 2011 more than 14,152 residencies were revoked from Palestinian Jerusalemites.⁴⁹ Most of these revocations, more than 11,000 of them, took place after introducing the ‘centre of life’ policy in 1995.⁵⁰

More recently, a new dangerous precedent took place. In 2006, the Israeli ministry of interior decided to revoke the residency status of four Palestinians, three of whom had been elected for the Palestinian legislative council; the fourth had served as the Palestinian Authority’s minister for Jerusalem affairs.⁵¹ Israel’s justification for this revocation was their political affiliation, the “Change and Reform” party, which, as Israel argued, is affiliated with the militant Palestinian movement Hamas. According to the Israeli government, with this affiliation, the Palestinian legislative council members “severely violated their minimal obligation of loyalty to the state of Israel.”⁵²

Alarmed by the implications of this precedent, a number of human rights organizations petitioned the Israeli Supreme Court trying to cancel the revocations.⁵³ Attorney Hassan Jabareen, the General Director of Adalah, a human rights organization that aims at defending the rights of the Arab minority in Israel, said:

If the Supreme Court upholds the Interior Minister's decision, it will be dangerous for all Palestinians in Jerusalem since Israel can easily revoke their residency based

⁴⁸ Wolfson, “Revocation of Permanent Status from East Jerusalem Residents: HCJ 282/88 ‘Awad V. Shamir (judgment Dated June 5, 1988).”

⁴⁹ B’Tselem, “Statistics on Revocation of Residency in East Jerusalem,” *B’Tselem*, December 3, 2012, http://www.btselem.org/jerusalem/revocation_statistics.

⁵⁰ Ibid.

⁵¹ The Civic Coalition for Palestinian Rights in Jerusalem, *Four Elected Members of Palestinian Legislative Council Given Notice of Transfer and Deportation*, Press Release, June 17, 2010, <http://civiccoalition-jerusalem.org/press-releases/four-elected-members-palestinian-legislative-council-given-notice-transfer-and-deport>.

⁵² Israel Ministry of Foreign Affairs, “Removal of Jerusalem Residency of Four Hamas Representatives - Legal Background 28-Jun-2010,” June 28, 2010, http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Removal_Jerusalem_residency_Hamas_representatives_28-Jun-2010.

⁵³ HCJ 7803/06, Khalid Abu Arafah et al. v. Minister of Interior (HCJ Case Pending).

on their legitimate political affiliations or activities. International law prohibits the occupying power from demanding loyalty from the occupied people.⁵⁴

Since 2006, this case has been pending in the Supreme Court which refused in June 2010 to give a temporary order requested by the petitioners to prevent the expulsion of the parliamentarians until the case is decided.⁵⁵ A few days after this decision, the deportees-to-be sought refuge at the International Committee of the Red Cross (ICRC) building in East Jerusalem and stayed there holding a long sit-in until the Israeli police arrested them in two separate incidents.⁵⁶ Two of the parliamentarians have been forcibly transferred to the West Bank, while the others, who were arrested in January 2012, are facing criminal charges including illegal presence in Israel.⁵⁷ Should the petition be rejected and the criminal charges accepted by the Israeli judicial system, the new criterion of “loyalty” to the state of Israel will become a new requirement for a Palestinian to keep his or her residency. This might in turn raise the rate of displacement in Jerusalem significantly.

⁵⁴ Adalah- The Legal Center for Arab Minority Rights in Israel, *Motion for Injunction Filed to Israeli Supreme Court to Stop Imminent Deportation Process of Palestinian Legislative Council Members from Jerusalem*, Press Release (Haifa: Adalah- The Legal Center for Arab Minority Rights, June 15, 2010), http://www.adalah.org/eng/pressreleases/pr.php?file=15_06_10.

⁵⁵ Adalah- The Legal Center for Arab Minority Rights in Israel, *Israeli Supreme Court Rejects Motion for Injunction to Stop Imminent Deportation Process of Palestinian Legislative Council Members from Jerusalem*, News Update (Haifa: Adalah- The Legal Center for Arab Minority Rights, June 21, 2010), http://www.adalah.org/eng/pressreleases/pr.php?file=21_06_10_1.

⁵⁶ Al-Haq, “Cracking Down on Palestinian Political Life in East Jerusalem: Israel Arrests PLC Member Mr. Ahmed Attoun to Enforce His Forcible Transfer from the City,” *Al-Haq- Defending Human Rights in Palestine Since 1979*, October 1, 2011, <http://www.alhaq.org/advocacy/topics/population-transfer-and-residency-right/467>; International Committee of the Red Cross, “Jerusalem: Former Minister for Jerusalem Affairs and PLC Member Arrested,” January 23, 2012, <http://www.icrc.org/eng/resources/documents/news-release/2012/israel-palestine-news-2012-01-23.htm>; Palestinian Centre for Human Rights, *PCHR Condemns Storming ICRC Head Office and Detention of PLC Member Toutah and Former Minister Abu 'Arafa*, Press Release, January 24, 2012, http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=8102:pchr-condemns-storming-icrc-head-office-and-detention-of-plc-member-toutah-and-former-minister-abu-arafa-&catid=36:pchrpressreleases&Itemid=194.

⁵⁷ Maysa Abu Ghazala, “Magistrate Court Extends Totah’s and Abu Arafah’s Detention,” *News, Bokra Online*, February 20, 2012, http://www.bokra.net/Articles/1161637/%D9%82%D8%A7%D8%B6%D9%8A_%D8%A7%D9%84%D9%85%D8%B1%D9%83%D8%B2%D9%8A%D8%A9_%D9%8A%D9%82%D8%B6%D9%8A_%D8%A8%D8%AA%D9%85%D8%AF%D9%8A%D8%AF_%D8%A5%D8%B9%D8%AA%D9%82%D8%A7%D9%84_%D8%B7%D9%88%D8%B7%D8%AD_%D9%88%D8%A7%D8%A8%D9%88_%D8%B9%D8%B1%D9%81%D8%A9_.html.

3.4 Family Unification

Simultaneously with Israel's policy of regulating methods that lead to revoke the legal status that enables the Palestinians to reside in their homes, it has also restricted giving this status to people who should be entitled to it. In the West Bank and Gaza, there were only two ways new names could be added to the population registry: registration of a new-born child of registered parents and "family unification," the latter being a process used to give residency rights to a family member who is not registered or who was registered as a resident but his residency status had been revoked. In Israel and East Jerusalem, family unification and child registration are the main ways in which new non-Jewish citizens and residents gain a status in Israel. Throughout the years, Israel has introduced several restrictions on both types of procedures for Palestinians. The following sections will discuss family unification and child registration in the West Bank and Gaza, and in Israel and East Jerusalem.

3.4.1 Family Unification in the West Bank and Gaza Strip

It was explained above that when Israel occupied the West Bank and Gaza it took a census, created new population registries for the West Bank and Gaza and issued new identity cards to those who were physically present in the newly occupied territories, given that they were not displaced during or shortly after the war.⁵⁸ The refugees who were displaced during the war as well as those who were for any purpose abroad during the war (between quarter to one third of the population of the West Bank and Gaza),⁵⁹ were not counted in the census, not considered as residents and denied right to return and reside in the OPT.⁶⁰ In the early stages of its occupation, Israel opened a small window known as "family unification" to add unregistered people to the population registry and

⁵⁸ See section 3.2 above.

⁵⁹ Badil, Resource Center for Palestinian Residency and Refugee Rights, *Survey of Palestinian Refugees and Internally Displaced Persons 2010-2012* (Beithlehem: BADIL, 2012), xxvi; Al-Haq, "Right to Unite," *Palestine Yearbook of International Law* 6 (1991 1990): 237. For more information about the 1967 refugees, see Chapter 2 above.

⁶⁰ John Quigley, "Family Reunion and the Right to Return to Occupied Territory," *Georgetown Immigration Law Journal* 6 (1992): 223–227.

give them the right to reside.⁶¹ In this procedure, the military authorities in the West Bank and Gaza had a wide discretion on family residency and no recognition of the right of return and the right to unite was granted as such.⁶² The Israeli government in several occasions announced that family unification was “not a vested right, but a special benevolent act of the Israeli authorities,”⁶³ and that Israel aims at accepting “the minimum possible number of applications.”⁶⁴ In addition to being the only available window for the war refugees to return, this procedure was also the only way whose residencies had been revoked to return, as well as the way to invite a foreign spouse or other family members to reside in the OPT with their resident relative.⁶⁵

In the early stages of the occupation, applications were allowed to be submitted on behalf of first degree relatives only, as long as the requested relative was not a male between the ages of 16 and 60.⁶⁶ Israel implemented this policy for a period of five years during which it reportedly rejected or refrained from processing most of the applications and approved some.⁶⁷

In 1973, Israel decided to further restrict family unifications by applying undeclared new criteria.⁶⁸ The new military order was never published, but its effect was

⁶¹ Human Rights Watch, *Forget About Him, He's Not Here*, 20; HaMoked and B'Tselem, *Perpetual Limbo*, 8.

⁶² Quigley, “Family Reunion and the Right to Return to Occupied Territory,” 223–229.

⁶³ HaMoked and B'Tselem, *Perpetual Limbo*, 9.

⁶⁴ Riziq Shuqair and Randa Siniora, *Application Denied: Separated Palestinian Families Tell Their Stories* (Al-Haq, 1991), 3, <http://www.alhaq.org/publications/publications-index/item/application-denied-separated-palestinian-families-tell-their-stories>.

⁶⁵ Al-Haq, “Right to Unite,” 244–5.

⁶⁶ HaMoked and B'Tselem, *Perpetual Limbo*, 9.

⁶⁷ Exact numbers of applications submitted, accepted, and denied are not known to the best of the knowledge of the current author. Al-Haq has indicated that the vagueness in statistics seems to be intentional on the part of the Israeli authorities. See, Rubā Sālim, *Al-Haq: 25 Years Defending Human Rights (1979-2004): Waiting for Justice* (Al-Haq, 2005), 208; HaMoked and B'Tselem in two of their reports estimated that in the first five years Israel approved to add around 45,000- 50,000 displaced Palestinians into the population registry, out of a total number of 140,000 applications. HaMoked and B'Tselem, *Families Torn Apart: Separation of Palestinian Families in the Occupied Territories*, 30; HaMoked and B'Tselem, *Perpetual Limbo*, 9; Human Rights Watch mentioned that by the end of the 1970s, Israel granted 50,000 applications, with 150,000 additional applications still pending. Human Rights Watch, *Forget About Him, He's Not Here*, 6.

⁶⁸ HaMoked and B'Tselem, *Families Torn Apart: Separation of Palestinian Families in the Occupied Territories*, 30; HaMoked and B'Tselem, *Perpetual Limbo*, 9; Human Rights Watch, *Forget About Him, He's Not Here*, 7.

noticed and documented as the number of approved applications dropped dramatically until 1983,⁶⁹ the year in which the Israeli military authorities re-evaluated their family unification policy and again created new restrictions in order to limit the number of approved applications. Between 1983 and 1993, the numbers of approved family unification applications dropped dramatically, and approval of such application was very rare and exceptional.⁷⁰ The cases that were approved for family reunification in that period were (1) cases of “administrative considerations,” or “governmental interest,” which mainly referred to allowing families of those who collaborate with the occupation forces to get a residency status, and a few cases of big Palestinian investors who intended to invest in the occupied territories; or (2) cases with “exceptional humanitarian considerations,” a term that was not defined and could not really be used as a basis of family unification.⁷¹ In addition to these restrictions, the military government created a new requirement in 1985 according to which those family members who were the subject of the family unification application could not reside in the occupied territory until a final decision was taken on the application.⁷² Several families ignored this prohibition and faced deportation as a result.⁷³

In 1995, the Palestinian Authority was established in parts of the occupied territory as a result of the Oslo Peace agreement which allowed the Palestinian Authority to assume some limited responsibility over the Palestinian Population Registry in the West Bank (excluding East Jerusalem) and Gaza.⁷⁴ In relation to family unifications, the agreement stated:

⁶⁹ It was estimated that Israel approved approximately 1000 applications per year during those years. HaMoked and B’Tselem, *Perpetual Limbo*, 9; Human Rights Watch, *Forget About Him, He’s Not Here*, 7.

⁷⁰ HaMoked and B’Tselem, *Families Torn Apart: Separation of Palestinian Families in the Occupied Territories*, 31; HaMoked and B’Tselem, *Perpetual Limbo*, 9–10; Human Rights Watch, *Forget About Him, He’s Not Here*, 7.

⁷¹ HaMoked and B’Tselem, *Families Torn Apart: Separation of Palestinian Families in the Occupied Territories*, 31–2; HaMoked and B’Tselem, *Perpetual Limbo*, 10; Al-Haq, “Right to Unite,” 239–40.

⁷² HaMoked and B’Tselem, *Perpetual Limbo*, 10–1.

⁷³ *Ibid.*, 11–12.

⁷⁴ Israel and Palestine Liberation Organization, “Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip.”

To reflect the spirit of the peace process, the Palestinian side has the right, with the prior approval of Israel, to grant permanent residency in the West Bank and the Gaza Strip to:
investors, for the purpose of encouraging investment;
spouses and children of Palestinian residents, and
other persons, for humanitarian reasons, in order to promote and upgrade family reunification.⁷⁵

In practice, the Palestinian authority served as a messenger between the Palestinian population and Israel that had no authority to approve applications, but that was allowed to reject them.⁷⁶ The procedure was that the family unification applications are filed to the PA, which sends them to the Israeli military authorities to be processed and informs the applicant of the answer if and when it is issued.⁷⁷ Israel processed applications according to a quota of maximum 2,000 persons per year, which fell far below the needs of the Palestinian population.⁷⁸ This quota rose to 3,000 in 1998 and to 4,000 in early 2000.⁷⁹

In the year 2000, when the second Palestinian Intifada started, Israel decided suddenly not to process any applications related with the Palestinian population registry with the exception of child registration (with restrictions explained below). Israel did not publish any military order or other type of regulation that explains the new reality.⁸⁰ In relation to family unification applications, this freeze meant that Israel refused to process any such applications.⁸¹ The only interruptions of this freeze were related to (1) undefined

⁷⁵ Ibid., Annex III, Article 28 (11).

⁷⁶ HaMoked and B'Tselem, *Families Torn Apart: Separation of Palestinian Families in the Occupied Territories*, 77–8.

⁷⁷ HaMoked and B'Tselem, *Perpetual Limbo*, 12.

⁷⁸ HaMoked and B'Tselem, *Families Torn Apart: Separation of Palestinian Families in the Occupied Territories*, 51, 80–1; HaMoked and B'Tselem, *Perpetual Limbo*, 12.

⁷⁹ HaMoked and B'Tselem, *Perpetual Limbo*, 12.

⁸⁰ Amnesty International, *Israel/Occupied Palestinian Territories: Right to Family Life Denied: Foreign Spouses of Palestinians Barred* (Amnesty International, March 21, 2007), <http://www.amnesty.org/en/library/info/MDE15/018/2007/en>; Amnesty International, *Israel and the Occupied Territories, Torn Apart: Families Split by Discriminatory Policies* (Amnesty International, International Secretariat, 2004), 15.

⁸¹ Human Rights Watch, *Forget About Him, He's Not Here*, 40–1; Amnesty International, *Right to Family Life Denied*; Amnesty International, *Torn Apart*, 14–5; Asem Khalil, "Family Unification of Residents in the Occupied Palestinian Territory," *European University Institute Robert Schuman Centre for Advanced Studies CARIM Analytic & Synthetic Notes* no. 2009/19 (2009): 9–11, http://cadmus.eui.eu/bitstream/handle/1814/11216/CARIM_AS?sequence=1; HaMoked and B'Tselem, *Perpetual Limbo*, 17.

“exceptional humanitarian cases” that Israel agreed to process; and (2) what Israel called a “political gesture” to the chairman of the Palestinian authority in 2008, in which it promised to process 50,000 applications of which 32,000 applications were approved.⁸² It was estimated in 2006 that the freeze had caused the accumulation of more than 120,000 family unification applications, which, as the Hamoked and B'Tselem report noticed, would take more than 30 years to be processed if Israel decided to return to process such applications according to the highest quota of 4,000 applications a year.⁸³ To make things even worse, Israel also stopped giving visitor permits to those invited by Palestinians to temporarily visit the OPT, practically making it impossible for separated families to unite in the OPT even temporarily.⁸⁴

Clearly, this makes the stability of many families impossible and keeps them the only option of living together abroad, or living separated. When Israel started to implement this policy, several families were already living together in the West Bank and Gaza waiting for their applications to be processed. Suddenly, these persons became illegally residing in the OPT and were unable to move around freely fearing that they would be deported.⁸⁵ Until the time of writing this thesis, the total freeze on family unification for Palestinians continues. Finally, it is important to mention that all these restrictions are only applicable to the Palestinian population in the West Bank. The Jewish colonists who reside therein do not need any special permits to enter the West Bank, live in it or bring their family members to reside with them.⁸⁶

3.4.2 Family Unification in East Jerusalem and other areas under Israeli civil law jurisdiction

As explained earlier, when Israel annexed East Jerusalem in 1967 it differentiated between the residency it gave to the inhabitants of the annexed East Jerusalem and the one it gave to those who lived in the rest of the West Bank and Gaza. The Jerusalem status

⁸² Human Rights Watch, *Forget About Him, He's Not Here*, 44–5; HaMoked and B'Tselem, *Perpetual Limbo*, 17–9.

⁸³ HaMoked and B'Tselem, *Perpetual Limbo*, 19.

⁸⁴ Human Rights Watch, *Forget About Him, He's Not Here*, 46–50.

⁸⁵ HaMoked and B'Tselem, *Perpetual Limbo*, 27–9.

⁸⁶ Amnesty International, *Right to Family Life Denied*.

was that of an Israeli resident and it allowed its bearer to reside and work in East Jerusalem and Israel, obliged him to be a full Israeli tax payer and a member of the social welfare system.⁸⁷

In the aftermath of the 1967 occupation and annexation, many Palestinian families ended up being divided across the new borders and all those who got West Bank or Gaza residencies became obliged to acquire an Israeli residency by going through family unification procedures, should they wish to live with their family members in occupied and annexed East Jerusalem or Israel.⁸⁸ This application was processed by the Israeli Ministry of Interior (hereinafter, Mol), which opened a separate branch for East Jerusalem residents where treatment of Palestinians coming to process any applications was uniquely humiliating, compared to other branches of the Ministry.⁸⁹

From the beginning of the occupation until the year 1994, the Mol refused applications submitted by female Palestinians to invite their husbands to reside with them in East Jerusalem or Israel.⁹⁰ The ministry justified this policy by saying that they perceived that in Arab culture "the wife follows her husband."⁹¹ In 1994, following a petition at the Supreme Court against this policy, the ministry of interior changed this policy and allowed women to make family unification applications on behalf of their spouses.⁹²

Between that decision and 1997, Israel refrained from processing thousands of family unifications and decided that if the invited spouse was a resident of the West Bank

⁸⁷ See, sec. 3.3 above.

⁸⁸ HaMoked, B'Tselem, and Stein, *The Quiet Deportation: Revocation of Residency of East Jerusalem Palestinians*, 10; HaMoked, B'Tselem, and Stein, *The Quiet Deportation Continues: Revocation of Residency and Denial of Social Rights of East Jerusalem Residents*, 20; HaMoked, B'Tselem, and Yael Stein, *Forbidden Families: Family Unification and Child Registration in East Jerusalem* (B'Tselem; HAMOKED, 2004), 7.

⁸⁹ HaMoked, B'Tselem, and Stein, *Forbidden Families: Family Unification and Child Registration in East Jerusalem*, 5; UN OCHA, *East Jerusalem: Key Humanitarian Concerns* (Office for the Coordination of Humanitarian Affairs (OCHA), 2011), 19, http://www.ochaopt.org/documents/ocha_opt_jerusalem_report_2011_03_23_web_english.pdf.

⁹⁰ HaMoked, B'Tselem, and Stein, *Forbidden Families: Family Unification and Child Registration in East Jerusalem*, 7; Sālim, *Al-Haq*, 206.

⁹¹ HaMoked, B'Tselem, and Stein, *Forbidden Families: Family Unification and Child Registration in East Jerusalem*, 7.

⁹² HaMoked, B'Tselem, and Stein, *The Quiet Deportation: Revocation of Residency of East Jerusalem Palestinians*. Citing letter from Yocheved Gensin, senior deputy to the state attorney to attorney Eliahu Abrams of ACRI sent on 23 June 1994. This letter followed the petition HCJ 2797/93, Gharbit v. Minister of Interior; which was withdrawn after the state agreed to change the policy.

or Gaza Strip he/she would not get a permit to enter Israel until an answer is given to the family unification application.⁹³ In early 1997, the Mol introduced new procedure replacing the older policy, according to which applicants were granted a permanent residency status. The new policy was called the “graduated procedure” deferring granting a permanent residency status five years and three months from the day the application is approved.⁹⁴ During those years, the Israeli government did not grant an entry permit to the spouse invited to reside, thus forcing the families to live separately during that period, but more importantly preventing the family unification application from being accepted due to the claim that the family’s centre of life is not Israel.⁹⁵ As Yael Stein puts it, the policy “made it impossible for couples to comply with the law and at the same time obtain approval of their request for family unification.”⁹⁶ Of course, if the inviting spouse was only an Israeli resident, which is the case for most East Jerusalemites, this spouse will lose his/ her status in Jerusalem should they go to live with their partner in the West Bank, Gaza, or anywhere else outside Israel or Jerusalem.⁹⁷ The Association for Civil Rights in Israel (ACRI) described this procedure as “bureaucratic red tape” that discriminates actively against Arab citizens and residents of Israel.⁹⁸ According to B’Tselem and HaMoked, the Mol frequently changed the regulations without informing the public, causing further obstacles for the public who were not aware of the applicable procedures.⁹⁹

⁹³ Ibid., 10; HaMoked, B’Tselem, and Stein, *The Quiet Deportation Continues: Revocation of Residency and Denial of Social Rights of East Jerusalem Residents*, 20–1.

⁹⁴ HaMoked, B’Tselem, and Stein, *Forbidden Families: Family Unification and Child Registration in East Jerusalem*, 7; HaMoked, B’Tselem, and Stein, *The Quiet Deportation Continues: Revocation of Residency and Denial of Social Rights of East Jerusalem Residents*, 21–2.

⁹⁵ HaMoked, B’Tselem, and Stein, *Forbidden Families: Family Unification and Child Registration in East Jerusalem*, 9.

⁹⁶ Ibid.

⁹⁷ See sec.3.3 above.

⁹⁸ Association for Civil Rights in Israel, *Comments on the Combined Initial and First Periodic Reports Concerning the Implementation of the International Covenant of Civil and Political Rights (ICCPR): Submitted to the United Nations Human Rights Committee* (Association for Civil Rights in Israel, 1998), 110, <http://www.acri.org.il/pdf/ICCPR1998.pdf>.

⁹⁹ HaMoked, B’Tselem, and Stein, *Forbidden Families: Family Unification and Child Registration in East Jerusalem*, 8.

In 2000, Israel effectively, but without any formal declaration or decision, froze family unifications for Palestinians.¹⁰⁰ In 2002, the Israeli government issued a decision to freeze all family unification applications where the alien spouse is a resident of the OPT or is of Palestinian descent, until a new policy is legislated by the parliament.¹⁰¹ The decision also stated that the status of Palestinians whose applications were being processed stay outside Israel until the decision is made.¹⁰² For those who got an approval on the family unification application under the gradual procedure, their status will not be upgraded.¹⁰³

In 2003, the Israeli parliament issued a new law that anchored the previous year's government decision. According to the new law, called the "Nationality and Entry into Israel Law (Temporary Order), 5763-2003,"¹⁰⁴ Israel totally froze the family unification procedure for Palestinians.

Article 2 of this law states:

... the Minister of the Interior shall not grant citizenship to a resident of the Region pursuant to the Citizenship law and shall not give a resident of the region a permit to reside in Israel pursuant to the Entry into Israel Law, and the commander of the Region shall not give such resident a permit to stay in Israel pursuant to the security legislation in the Region.¹⁰⁵

The "Region" referred to the West Bank and Gaza (Article 1) and the Resident of the Region included those who were registered in the population registry of the Region and those who resided there without having been registered, with the exception of the residents of the Israeli settlements.¹⁰⁶ This temporary law has been extended consistently since 2003 until the time of writing this thesis. It was amended twice in 2005 and 2007 and its effect was expanded to prohibit family unification of spouses who hold the

¹⁰⁰ Human Rights Watch, "Israel: Don't Outlaw Family Life," July 28, 2003, <http://www.hrw.org/news/2003/07/27/israel-don-t-outlaw-family-life>.

¹⁰¹ Israeli Government, "Decision no. 1813" (HaMoked, May 12, 2002), <http://www.hamoked.org.il/items/2960.pdf>.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Israeli Knesset, *Nationality and Entry into Israel Law (Temporary provision)*, 2003, http://www.knesset.gov.il/laws/special/eng/citizenship_law.htm.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

citizenship or are residents of Iraq, Iran, Syria and Lebanon and any “area in which operations that constitute a threat to the state of Israel are being carried out.”¹⁰⁷

This legislative freeze blocked the way in front of lawyers and human rights organizations to defend individual cases of family unification in court. The legal opposition taken by a number of human rights organizations led by Adalah was to file petitions in the Supreme Court claiming that the law was unconstitutional and breaching international human rights law. The first case was filed in 2003 by Adalah, (The Legal Centre for Arab Minority Rights in Israel) and a number of families that were affected by the law.¹⁰⁸ The main argument of the petitioners in this case was that the law violates the right of the Arab minority to equality, since most of those who marry residents of the occupied territory are the Arab citizens and residents of Israel.¹⁰⁹ In addition, the petitioners argued that the law violated their constitutional family rights.¹¹⁰ But the Israeli basic law which has constitutional value does not expressly grant the right to equality between its citizens or the right to family life.¹¹¹ Adalah also argued that the law violates the private life or the Arab citizens, the right to personal freedom, the right of a parent to have contact with his child and the right to build a family.¹¹²

The Israeli respondents justified this policy by two main arguments, one official and another that can be described as less official. The official one, which was presented by the government in front of the court, is a security argument which claims that since the beginning of the second intifada, “twenty six residents of the territories who received status in Israel as a result of family reunifications were involved in real aid and assistance to terror attacks against Israelis.”¹¹³ In addition, the argument continues, the Israeli security officials have assessed that “there is a security need to prevent, at this time, the entry of residents of the territories, as such, into Israel, since the entry of residents of the

¹⁰⁷ *Nationality and Entry into Israel Law (Temporary Order)(Amendment)*, 2005; *Nationality and Entry into Israel Law (Temporary Order)(Amendment)*, 2007.

¹⁰⁸ Adalah vs. Minister of Interior (HCJ 2006).

¹⁰⁹ Ibid., para. 9.

¹¹⁰ Ibid.

¹¹¹ *Basic Law: Human Dignity and Liberty*, 1992, Translation to English is available at the Israeli Parliament (Knesset) Website. Available at: http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.

¹¹² Adalah vs. Minister of Interior, 10 (HCJ 2006), para. 10.

¹¹³ Ibid., para. 12.

territories into Israel and their free movement within the state by virtue of the receipt of Israeli documentation is likely to endanger, in a very real way, the safety and security of citizens and residents of the state.”¹¹⁴ After thorough examination of the factual basis of this argument, it was later revealed that only 7 of all the 130,000 who entered Israel through family unification since 1996 were indicted for “security offences.”¹¹⁵

The less official argument was made by several officials in official meetings and to the media before, during and after the legislative process of the law, but was not represented by the state in the Supreme Court proceedings. This argument goes to claim that the Jewish character of the state will be jeopardized, should the state continue to grant a status to non-Jews (especially Palestinians) through family unification procedure.¹¹⁶ In Israel 2005 Israel’s prime minister Ariel Sharon stated that “there is no need to hide behind security arguments. There is a need for the existence of a Jewish state.”¹¹⁷ Similarly, the interior minister was quoted presenting the number of Palestinian who gained a status in Israel through family unification, which worried the minister who thought that the numbers “prove that the right of return was being realized through the back door of the State of Israel.”¹¹⁸ Similarly, these opinions were raised while proposing and discussing the bill in the Israeli parliament, the Knesset.¹¹⁹ In the court case “HCJ 7052/03 *Adalah vs. The minister of Interior*” an organization called “Jewish Majority in Israel” joined the case as a respondent and argued that indeed the law needed to be there to preserve such majority.¹²⁰ This case was dismissed by the majority of the justices on the bases that the law was constitutional because the violation to the basic rights of the citizens of Israel was proportional to the security need the legislator was trying to meet

¹¹⁴ Ibid.

¹¹⁵ *Israel Imposes Racist Law on Palestine-Infocus-05-20-2012*, 2012, http://www.youtube.com/watch?v=ZmW9h_FhzPI&feature=youtube_gdata_player.

¹¹⁶ HaMoked, B’Tselem, and Stein, *Forbidden Families: Family Unification and Child Registration in East Jerusalem*, 17–20; Khalil, “Family Unification of Residents in the Occupied Palestinian Territory,” 12.

¹¹⁷ Ben White, “Israel: Ethnic Cleansing in the Negev,” News, *Al-Jazeera English*, October 22, 2012, <http://www.aljazeera.com/indepth/opinion/2012/10/2012102114393741506.html>.

¹¹⁸ HaMoked, B’Tselem, and Stein, *Forbidden Families: Family Unification and Child Registration in East Jerusalem*, 18.

¹¹⁹ *Adalah vs. Minister of Interior*, 264 (HCJ 2006), 264.

¹²⁰ Ibid., 30.

when the statute was enacted.¹²¹ Justice Chechin, who led the majority opinion in this case, started his judgment by writing a fictional dream in which he and Justice Barak, the leader of the minority opinion, land in Utopia and have a conversation with Thomas More. According to the fictional story he asked More whether the legal system in Utopia was similar to that of Israel, More answered:

I am sorry, but there are vast differences between the two legal systems, and it will be a long time before Israel reaches the level of Utopia. At this time, you are fighting for your lives, for the existence of the state, for the ability of the Jewish people to have a communal and national life like all peoples. The laws of Utopia- in the position you find yourselves in at present- are not for you. Not yet. Take care f yourselves, do the best you can and live.¹²²

Since then, this “temporary” law has been renewed consistently and has affected thousands of families. Adalah and other organizations petitioned against the law again upon its renewal in 2007, but the petition was rejected again in January 2012.¹²³ Justice Guris made the title of his opinion: “human rights are not a prescription for national suicide.”¹²⁴ The statement made by Guris reflects a doctrine followed by the Israeli court, according to which respecting the lives of Palestinian families in Jerusalem to live together would constitute “national suicide.” This doctrine is also dominant in relation to child registration, as will be shown below.

3.5 Child Registration

In addition to its policies of residency revocation and banning family unification procedures, Israel also introduced several obstacles on the process of registering children in the population registry (hereinafter child registration). As noticed above, this registration is essential for exercising one's right to live in his land, work and move around both internally and abroad.

As in other cases, Israel has assigned different policies in the areas it runs as “administered territories” and others it considers as part of its sovereign territory. Thus, this section is divided into these two subthemes, the first explaining the child registration

¹²¹ Ibid., 218.

¹²² Ibid., 127.

¹²³ HCJ 466/07, MK Zahava Galon v. Attorney General, et al (Israeli Supreme Court 2012).

¹²⁴ Ibid., 207 (in Hebrew).

problem in the West Bank and Gaza Strip and the second discussing the same question in Israel and Jerusalem.

3.5.1 Child Registration Under the military regime in the West bank and Gaza

Following the Israeli occupation of the West Bank and Gaza Strip in 1967 and the installation of the military regime therein, a new-born child could be registered in the population registry until the age of 16, whether he was born in the OPT or abroad, provided that one of his parents is registered in the population registry.¹²⁵ This regulation continued to be applicable until Israel decided to add new restrictions in 1987. The newly added regulation introduced the following restrictions on child registrations: a) a child would not be registered if his mother is not registered in the population registry, regardless of whether the child was born in the OPT or abroad; b) in cases where the child is born abroad, the child can be registered only until the age of 5; and c) in cases where only the mother is a registered resident, she can only register her child until the age of five.¹²⁶ These hard restrictions were cancelled by the Israeli military authorities in January 1995, replacing it with a new regulation that went one step forward and one backward. The improvement was that the new military order cancelled the restrictions of 1987 and advanced the age for registering children to 18 for the first time.¹²⁷ The step backward was that the new order stated that if only one of the parents was a registered resident, he/she can only register his/her child once they prove they permanently reside in the OPT.¹²⁸ According to HaMoked, the military authorities did not apply the less restrictive aspect of the new regulation and continued to implement the 1987 regulations.¹²⁹

Later in 1995, the Interim Peace Agreement between the PLO and Israel was signed and the responsibility of registering new-born Palestinian children in the areas that

¹²⁵ HaMoked and B'Tselem, *Perpetual Limbo*, 13.

¹²⁶ Military Commander for the Judea and Samaria, *Order Concerning Identity Cards and Population Registration (Amendment No' 17) (Judea and Samaria) (No' 1206)*, 1987.

¹²⁷ Military Commander for the Judea and Samaria, *Order Concerning Identity Cards and Population Registration (Amendment No' 23) (Judea and Samaria) (No' 1421)*, 1995.

¹²⁸ Ibid.

¹²⁹ HaMoked and B'Tselem, *Perpetual Limbo*, 13.

became under the jurisdiction of the Palestinian Authority was transferred to that authority. Article 28(12) of the agreement stat:

The Palestinian side shall have the right to register in the population registry all persons who were born abroad or in the Gaza Strip and West Bank, if under the age of sixteen years and either of their parents is a resident of the Gaza Strip and West Bank.¹³⁰

According to the agreement, the Palestinian authority had the obligation of only informing Israel about the new registrations and no prior authorization was required.¹³¹ Nonetheless, Israel, who continues to exercise the ultimate powers in the occupied territory, added a new regulation: a child has to be physically present in the occupied territory to be registered.¹³²

In 2002, Israel stopped recognizing the registration of children who were registered after the age of 5 if born abroad, despite the interim peace agreement.¹³³ In the following year, it retreated from the ban, but kept a requirement that the child has to be physically present in the OPT to be registered.¹³⁴ Nonetheless, Israel continued to block the registration of children born abroad by not giving them a permit to enter the OPT and be registered therein.¹³⁵ Once a child has passed the age of 16, he loses his right to be registered in the population registry and the only way for him to be able to reside in the OPT “legally” would be through going through a successful family unification process, which has been frozen as mentioned earlier.¹³⁶ In addition, those who were born and raised in the OPT but for some reason were not registered in the OPT were considered to be living illegally there and needed to file a family unification application.¹³⁷

¹³⁰ Israel and Palestine Liberation Organization, “Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip”, Annex III, Article 28(12).

¹³¹ Human Rights Watch, *Forget About Him, He’s Not Here*, 90; HaMoked and B’Tselem, *Perpetual Limbo*, 25.

¹³² HaMoked and B’Tselem, *Perpetual Limbo*, 25.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Human Rights Watch, *Forget About Him, He’s Not Here*, 90; HaMoked and B’Tselem, *Perpetual Limbo*, 26.

¹³⁷ HaMoked and B’Tselem, *Perpetual Limbo*, 26.

There has been no intervention from the Supreme Court on Israel's decision to freeze the population registry, even in cases related to children. There have been cases when the military government decided to give an entry permit for the purpose of registration, following interventions from human rights organizations to prevent the issue from being discussed in the Court.¹³⁸ Nonetheless, those who passed the age of 16 were not given remedies from the Supreme Court, even though it could be that the child was prevented from registration because of the laws and regulations Israel has enforced over the years. For example, in the "Qanam v. Commander of Military Forces in the West Bank" case the Supreme Court declined the petition of a father to register his child born in Jordan, because the application was made 4 months after the child turned 16.¹³⁹ It was argued in the case that when the child was born in 1989, the military law then did not allow the registration of a child whose mother was not a registered resident of the OPT. This argument did not help either, and the court continued to accept the state's position that the freeze of the Palestinian population registry was subject to the political relationship between Israel and the Palestinian Authority. Eventually, the court concluded:

Indeed, as a result of the political situation in the region individuals suffer. The conditions of the petitioners, whose centre of life is in Jordan, might be better than other people's conditions. Anyway, the suffering of the petitioner is not different from the suffering of others in the current political situation. Therefore, we cannot assist them.¹⁴⁰

It can be noted that this judgment did not use any human rights standards to reach its conclusion and considered the registration of children a political issue. This politicising of a child's right to be registered and to live in his parents' home meant that no remedy can be expected from the Supreme Court until significant changes are introduced to the political and legal frameworks that rule the relationship between the Palestinian civilian

¹³⁸ See, for example, HaMoked, center for the Defence of the Individual, "The State Prevents Palestinian Children Living Abroad to Enter the West Bank, and Thus Impedes Them from Exercising Their Right to Be Registered According to Law in the Palestinian Registry of Residents: As a Result of Petitions Filed by HaMoked, the State Agreed to Allow the Petitioning Children to Enter the West Bank. HaMoked Continues to Demand a Major Change in Israel's Policy on This Issue.," June 19, 2005, http://www.hamoked.org/Document.aspx?dID=150_update.

¹³⁹ HCJ 2327/06, Qanam v. Commander of Military Forces in the West Bank (Israeli Supreme Court 2008).

¹⁴⁰ Ibid. Own Translation from Hebrew.

population and Israel.¹⁴¹ Additionally, Israel has been implementing policies to restrict child registration in areas on which it extends its sovereignty.

3.5.2 Child Registration in the Israeli Civil Law Regime: Israel and the Annexed Territories

Within the areas in which Israel exercises its sovereignty, the non-Jewish population has been facing increasing restrictions in relation to child registration. The most difficult restrictions target those who hold a residency status, mainly Palestinian residents of Jerusalem. Nonetheless, there are some restrictions on the registration of the children of citizens that affect non-Jews mainly. The next two sub-sections will discuss child registration restrictions for residents and citizens respectively.

3.5.2.1 Child Registration Restrictions for Residents

It was estimated in 1997 and again in 2010 that there are more than 10,000 Palestinian children in Jerusalem who had no legal status and, as a result, no right to reside permanently with their parents who hold the status of permanent residents of Israel.¹⁴² This is the consequence of a series of policy changes that Israel took over the years that progressively restricted the right of many Palestinians in Jerusalem to register their children in the Israeli population registry in which they are registered as residents.

Child registration for infants born to East Jerusalem Palestinians is subject to the regulations governing the status given to foreigners in Israel as a result of the permanent residency status given to the Jerusalemites after the annexation of East Jerusalem. As mentioned earlier, the body of laws regulating such status consists mainly of the Entry into Israel Law of 1952¹⁴³; and the Entry into Israel Regulations (1974).¹⁴⁴

¹⁴¹ Remedies will be discussed in Chapter 5.

¹⁴² HaMoked, B'Tselem, and Stein, *The Quiet Deportation: Revocation of Residency of East Jerusalem Palestinians*, 31; the number cited here was again repeated in publications that were published later. see, eg., Jerusalem Center for Social & Economic Rights, *Residency Rights: Revocation of Palestinian Residency Rights in Jerusalem Until June 2, 2010*, 2010, http://www.jcser.org/index.php?option=com_content&view=article&id=12&Itemid=15; UN OCHA, *East Jerusalem*, 12.

¹⁴³ *Entry into Israel Law, 5712-1952*.

¹⁴⁴ *Entry into Israel Regulations (1974)*.

While the 1952 statute did not mention the status of children born to non-citizens, including permanent residents, the 1974 Regulations did, but without covering all the potential scenarios. Article 12 of the Regulations adopted by the Ministry of Interior in 1974 states:

A child who was born in Israel, but to whom section 4 of the Law of Return 5710-1950 does not apply, his Israeli status shall be the same as the status of his parents; should the parents not share one status the child shall receive the status of his father or of his guardian unless the second parent objects to this in writing; should the second parent object, the child shall receive the status of one of the parents, as shall be determined by the Minister.¹⁴⁵

In harmony with the relevant Israeli legislations, this regulation drew a clear distinction between Jewish and non-Jewish infants born in Israel. A Jewish child born in Israel to non-citizens is given the status of a Jewish immigrant automatically according to Section 4 of the Law of return referred to by this regulation¹⁴⁶ and, as such, he automatically receives the Israeli citizenship upon birth regardless of the status of his parents. A non-Jewish child born in Israel, nonetheless, gets the status of his parents. Thus, a child born in Israel (including annexed East Jerusalem) to a couple who both have a permanent residency automatically becomes a permanent resident and can be registered in his parents ID cards, provided that his parents' status as permanent residents is valid and their centre of life is in Israel.¹⁴⁷

The ministry of interior introduced restrictions on child registration in two cases: when one parent is not registered as an Israeli resident and when the child is not born in Israel, as will be shown below.

According to the text of Article 12 above, if the parents did not have the same status the child is given the status of the father or the guardian. If the other parent objects in writing, the minister of interior decides the status of the child. There is no mention of

¹⁴⁵ Ibid. An unofficial English Translation of Article 12 is provided by HaMoked, available at: <http://www.hamoked.org/files/2010/Regulation%2012.pdf>.

¹⁴⁶ *The Law of Return, 5710-1950, Published in Sefer Ha-Chukkim No. 51 of the 21st Tammuz, 5710 (5th July, 1950), p. 159, 1950*, Translation provided at the website of the Israel Ministry of Foreign Affairs, available at: http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Law%20of%20Return%205710-1950.

¹⁴⁷ HaMoked, B'Tselem, and Stein, *Forbidden Families: Family Unification and Child Registration in East Jerusalem*, 26.

the status of a child of residents born abroad. The gap in legislations and regulations that did not cover the status of such child born abroad and the status of a child born to only one parent who holds the residency left these issues to be dealt with through the internal procedures of the ministry of interior.¹⁴⁸

The practice of the Mol has developed over time. Following the occupation, it refused to register children of Palestinian women as residents until 1994, when they started to perform such registration until 1998.¹⁴⁹ In that year, Israel stopped again registering children if only their mother was a resident, regardless of whether they were born abroad or in Israel, and gave them a temporary residency instead.¹⁵⁰ In the following year, Israel stopped giving these temporary residency permits and returned to giving permanent residency.¹⁵¹

After the year 2000, big restrictions were quickly introduced. As for children of permanent residents born abroad, the regulations were silent, but Israel initially registered children of Palestinian Jerusalem residents born abroad. In 2002, a short period after the Israeli government decided to freeze family unification for Palestinians, the Israeli human rights organization, HaMoked, noticed that the ministry of interior started handling the registration of children born “abroad” (which includes the West Bank and Gaza for that matter, but excluding the Israeli settlements therein) as family unification cases, as opposed to child registration ones.¹⁵² This change of policy was not published anywhere, but its consequences were devastating: thousands of infants were liable to not be registered in the Israeli population registry. As a result, HaMoked filed a petition in the Administrative Court, which resulted in an agreement according to which Israel had to

¹⁴⁸ UN OCHA, *East Jerusalem*, 22; HaMoked, B’Tselem, and Stein, *Forbidden Families: Family Unification and Child Registration in East Jerusalem*, 26.

¹⁴⁹ HaMoked, center for the Defence of the Individual, “Hamoked’s Timeline: Residency in Jerusalem- 1967 Until Today,” <http://www.hamoked.org/Timeline.aspx?pageID=timeLineNews>.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² HaMoked, B’Tselem, and Stein, *Forbidden Families: Family Unification and Child Registration in East Jerusalem*, 26; B’Tselem- The Israeli Information Center for Human Rights in the Occupied Territories, “Interior Ministry Prevents Children of Palestinian Residents of Jerusalem from Receiving Legal Status in Israel,” *B’Tselem*, January 1, 2011, http://www.btselem.org/family_separation/child_registration_in_east_jerusalem.

make its policy public.¹⁵³ The policy announced in the declarative judgment stated that the Ministry of Interior will treat cases of child registration for a child born abroad to a resident parent as cases of family unification, in which the child is given a temporary residency for two years followed by permanent residency.¹⁵⁴ However, paragraph 1 (e) of the judgment stated that this agreement shall not “affect the regulations of the ‘Nationality and Entry into Israel Law (Temporary Order) 2003’.”¹⁵⁵ This law was enacted by the Israeli parliament in 2003 as mentioned earlier aiming at blocking family unifications between Palestinians in Jerusalem or Israel and Palestinians from the West Bank and Gaza Strip.¹⁵⁶ On the issue of children, the statute provided:

The Minister of Interior, or the Area Commander, as the case may be, is entitled to grant... a licence to reside in Israel or a permit to stay in Israel in order to prevent the separation of a child, aged up to 12, from his parent who is staying in Israel legally.¹⁵⁷

This provision resulted in two significant consequences. First, it treated children above 12 as adults and provided that they would not be allowed to be registered in the population registry and reside in Jerusalem (or Israel) with their parents. Thus, shifting the category of the procedure for such children from “child registration” to “family unification” blocked their right to get a status. Secondly, it provided that children below twelve can be given either temporary permits to stay or permanent residencies. Thus, the law gave the option to the government to not register the child as a resident, but to give him a temporary permit instead.

In 2005 the relevant provision in the “Nationality and Entry into Israel Law (Temporary Order)” law was amended to the following:

...the minister of the interior may, at his discretion-
grant a minor who is a resident of the region and under 14 years of age a permit to reside in Israel in order to prevent his separation from his custodial parent who is staying lawfully in Israel;
approve a request that a permit to stay in Israel be granted by the regional commander to a minor who is a resident of the region and is over 14 years of age

¹⁵³ Ad.pt 402/03 Judeh et al vs. Minister of the Interior et al (Jerusalem District Court, sitting as Administrative Court 2004).

¹⁵⁴ Ibid., para. 1.

¹⁵⁵ Ibid., para. 1(e) Own translation from Hebrew.

¹⁵⁶ See, Section 3.4.2 above.

¹⁵⁷ *Citizenship and Entry into Israel Law (Temporary Provision)*.

in order to prevent his separation from his custodial parent who is staying lawfully in Israel, provided that the said permit shall now be extended if the minor does not reside permanently in Israel.¹⁵⁸

The term “resident of the region” is defined broadly in this law, and includes all persons who were registered as residents and all those who reside therein but who are not registered as residents, excluding those who reside in the Israeli settlements.¹⁵⁹ According to this amendment, children above 14 can only get military permits, which do not give any permanent status in Israel; in turn, it denies the bearer of such permit the basic rights of residents such as healthcare, education and the like, not to mention the right to permanently reside in his/her hometown.

Since then until the writing this thesis, child registration entitlements have been a subject of constant change through the internal procedures of the MoI. Although these procedures are neither statutes nor regulations, they actually happen to be an important source of law when it comes to the issue of child registration. This is mainly because the Israeli statutes and regulations do not mention the status of residents’ children born abroad, leaving this sensitive issue to the internal procedures of the ministry of interior. The ministry changed these procedures frequently, initially without informing the public, until the Jodah case discussed above when the ministry agreed to start publishing its procedures.

The development of these procedures was towards becoming more restrictive. In 2008, the ministry published a procedure according to which a child who was born or registered abroad has to prove having his centre of life in Israel for two years before submitting an application for child registration.¹⁶⁰ If their application is approved, the child will get a temporary residency for 2 years followed by a permanent residency. For children who Israel considers residents of the West Bank or Gaza, their status will not be upgraded to permanent residency if by the time they reach the age of 14 they have not finished the

¹⁵⁸ *Entry into Israel Law (Amendment) 2005.*

¹⁵⁹ *Citizenship and Entry into Israel Law (Temporary Provision) Article 1.*

¹⁶⁰ Israeli Ministry of Interior internal procedure, *Procedure on Registration and Granting of Status to a Child Only One of Whose Parents Is Registered as a Permanent Resident in Israel, Procedure Number 2.2.0010*, 2005, amended in 12/11/2008.

2 years of temporary residency, following 2 more years of residence.¹⁶¹ If the child was over 14, he can only apply for a military permit that does not give them any entitlements except temporary physical presence in Jerusalem and Israel.¹⁶²

In 2011, HaMoked filed an administrative petition against the Israeli ministry of Interior requesting the immediate registration of a child both of whose parents are permanent residents in Israel, but born in the West Bank. During the proceeding of the case, HaMoked and the government made an agreement which provided that “the mere fact that the child was born outside Israel does not prevent the immediate granting of permanent residency to the child.”¹⁶³ Of course, it remains that child registration is always subject to proving that the child and his guardian’s centre of life is in Israel.

3.5.2.2 Child Registration for Citizens: Discrimination

In addition to the severe restriction of child registration for residents, Israel also introduced discriminatory conditions regarding the passage of its citizenship through birth. The restriction was introduced in an amendment to the Nationality Law of 1952¹⁶⁴ that was introduced in 1980.¹⁶⁵ Prior to the amendment, Israeli citizenship was passed “by birth” from a parent to his/her child regardless of where the child was born.¹⁶⁶ Then the 1980 amendment changed this rule and gave the following groups the right to acquire Israel’s citizenship by birth:

- (1) a person born in Israel while his father or mother was an Israel national;
- (2) a person born outside Israel while his father or mother was an Israel national
 - (a) by return;
 - (b) by residence in Israel;
 - (c) by naturalisation;
 - (d) under paragraph (1).¹⁶⁷

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ AP22556-04-11 Arafat vs. Ministry of Interior, 1 (The Jerusalem District Court Sitting as the Court of Administrative Affairs 2011) Translation to English provided by HaMoked.

¹⁶⁴ *Nationality Law, 5712-1952, Published in Sefer Ha-Chukkim No. 95 of the 13th Nisan, 5712 (8th April, 1952), P. 146, 1952.*

¹⁶⁵ *Nationality (Amendment No. 4) Law, 5740-1980, Published in Safer Ha-Chukkim No. 984 of 6 Elul, 5740 (18 August 1980), P. 222, 1980.*

¹⁶⁶ *Nationality Law, 5712-1952, sec. 4* until 1980 stated: “A person born while his father or mother is an Israel national shall be an Israel national from birth; where a person is born after his father’s death, it shall be sufficient that his father was an Israel national at the time of his death.”

¹⁶⁷ *Nationality (Amendment No. 4) Law, 5740-1980, sec. 4.*

The effect of this amendment was that Israeli citizens who were born abroad could not register their children as citizens by birth anymore.¹⁶⁸ Despite the fact that this amendment can, in theory, affect Israel's Jewish and Arab citizens alike, in practice its negative effects are only targeting non-Jews. This is because only Jews can claim citizenship by return. If a Jewish child was not registered as a citizen by birth, his/her parents can claim his citizenship by return. The same does not apply to non-Jewish infants since they are not subjects to the law of return.

3.6 Freezing the “Change of address” procedure in the West Bank and Gaza Strip

Following the occupation of the OPT, Israel allowed the population to change their addresses within the West Bank and Gaza and required that they notify the relevant authorities within 30 days from the change.¹⁶⁹ In 1995, Israel and the Palestine Liberation Organization signed the Interim Agreements, which provided that the West Bank and Gaza Strip were a single territorial unit¹⁷⁰ and that

The Palestinian side shall inform Israel of every change in its population registry, including, inter alia, any change in the place of residence of any resident.¹⁷¹

According to this provision in the agreement, Israel had no jurisdiction to reject address changes within the West Bank and Gaza Strip. The Palestinian authority's responsibility was to only “inform” Israel of address changes. Thus, a resident of the Gaza Strip could move to the West Bank freely and vice versa without a need to acquire any special permits.

In the year 2000, Israel decided, as mentioned earlier, to freeze any changes to the Palestinian population registry.¹⁷² Due to this freeze, Israel stopped recognizing changes of

¹⁶⁸ Ayelet Shachar, “Whose Republic: Citizenship and Membership in the Israeli Polity,” *Georgetown Immigration Law Journal* 13 (1999 1998): 253.

¹⁶⁹ *Order Regarding Identity Cards and the Population Registry (Judea and Samaria)*, No. 297 Articles 11 and 13.

¹⁷⁰ “Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip”, Annex I, Article X.

¹⁷¹ *Ibid.*, Annex III, Article 28 (10).

¹⁷² Human Rights Watch, *Forget About Him, He's Not Here*, 27.

address within the OPT¹⁷³ and considered the residence of a Palestinian whose registered address is Gaza in the West Bank illegal, except with a special permit.¹⁷⁴ This assumption has given the military authorities the justification to forcibly transfer any such person who would be found in the West Bank to Gaza Strip.¹⁷⁵ As reported by Gisha, the forcible transfer of Palestinian residents of the West Bank who hold ID cards indicating that their address was in Gaza has been conducted actively by the Israeli authorities in four different circumstances:

following finding such resident at one of the many checkpoints run by the Israeli army in the West Bank, this Palestinian was arrested and then transferred;
by conducting active searches in the West Bank including entering homes and arresting and transferring such residents;
by transferring holders of such ID cards to Gaza following serving a prison term, regardless of the fact that they had actually been residing in the West Bank prior to their imprisonment;
or when such Palestinian is caught in Israel without permit.¹⁷⁶

As a result of Israel's control all the travel routes between the West bank and Gaza Strip, and within the West Bank itself, Israel managed to effectively separate the two areas from each other. At the beginning, this took place without Israel declaring any special policy or procedure, but then significant law "engineering" was introduced.

As noted by Israeli human rights organizations, Gaza registered residents do not need permits to be present in the West Bank, but Israel itself transferred Palestinians to Gaza Strip with the justification that they needed a permit to stay in the West Bank,

¹⁷³ Alon Margalit and Sarah Hibbin, "Unlawful Presence of Protected Persons in Occupied Territory? An Analysis of Israel's Permit Regime and Expulsions from the West Bank Under the Law of Occupation," *Yearbook of International Humanitarian Law* 13 (2010): 247; Gisha, Center for the Legal Protection of Freedom of Movement, *Disengagement Danger: Israeli Attempts to Separate Gaza from the West Bank*, February 2006,

http://www.gisha.org/UserFiles/File/publications_english/Disengagement_Danger_6feb_06.pdf; Yehezkel Lein, *One Big Prison: Freedom of Movement to and from the Gaza Strip on the Eve of the Disengagement Plan* (HaMoked and B'Tselem, 2005), 17,

http://www.btselem.org/download/200503_gaza_prison_english.pdf.

¹⁷⁴ Margalit and Hibbin, "Unlawful Presence of Protected Persons in Occupied Territory?," 263; Gisha, Center for the Legal Protection of Freedom of Movement, *Disengagement Danger*, 3.

¹⁷⁵ Gisha, Center for the Legal Protection of Freedom of Movement, *Disengagement Danger*, 3.

¹⁷⁶ Gisha, Center for the Legal Protection of Freedom of Movement, *Restrictions and Removal: Israel's Double Bind Policy for Palestinians Holders of Gaza IDs in the West Bank, November 2009*, November 2009, 2, http://www.gisha.org/item.asp?lang_id=en&p_id=1111.

although it had never introduced such permits.¹⁷⁷ In Gisha's words, such permits "simply did not exist."¹⁷⁸

Then Israel started regulating the matter by introducing two regulatory amendments. The first was by adopting procedures for dealing with applications of Palestinians wanting to move between Gaza Strip and the West Bank. According to human rights organizations, these procedures aimed at creating a one-way rout between the West Bank and Gaza. West Bank residents who applied for permits to travel to visit their family members in Gaza Strip were asked to sign for a declaration that they will never return to the West Bank and that they will change their address to Gaza strip.¹⁷⁹ This was the precondition for allowing them to see their family members in Gaza. For movement in this direction, Israel was willing to bypass its population registry freeze.

Movement in the opposite direction has been much more restricted. In 2007, Israel started issuing permits for Gaza registered residents to stay temporarily in the West Bank¹⁸⁰ using unpublished procedures.¹⁸¹ The general rule was not to allow such movement to take place, with the exception of very tight "humanitarian" standards. These standards did not consider the separation of families, for example, to be on its own a sufficient humanitarian pretext for allowing the movement of spouses or children to the West bank.¹⁸² Subject to security rejections and after defining the term "family relatives" as "family members of the first degree (spouses, parents to minor children, minor

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Abeer Jubran, "The Quiet Deportation of Palestinians from the West Bank to the Gaza Strip - HaMoked," Correspondence between Hamoked and the Military Legal Advisor in the West Bank, May 22, 2008, 1, <http://www.hamoked.org/Document.aspx?dID=110520>; Gisha, Center for the Legal Protection of Freedom of Movement, *Separation of Families Due to the Separation Between the Gaza Strip and the West Bank*, Information Sheet (Tel-Aviv: Gisha, Legal Center for Freedom of Movement, May 2010), 3, http://www.gisha.org/item.asp?lang_id=en&p_id=1093; Gisha, Center for the Legal Protection of Freedom of Movement and HaMoked, center for the Defence of the Individual, *New Procedure - Israel Bars Palestinians in Gaza from Moving to West Bank*, Position Paper, June 2009, 3, http://www.gisha.org/item.asp?lang_id=en&p_id=1117.

¹⁸⁰ Gisha, Center for the Legal Protection of Freedom of Movement, *Restrictions and Removal: Israel's Double Bind Policy for Palestinians Holders of Gaza IDs in the West Bank*, November 2009, 3.

¹⁸¹ Gisha and Hamoked have published the pocedure and translated it in English. See, *Procedure for Handling Applications by Gaza Strip Residents for Settlement in the Judea and Samaria Area*, 2009, http://www.gisha.org/item.asp?lang_id=en&p_id=1147.

¹⁸² Gisha, Center for the Legal Protection of Freedom of Movement and HaMoked, center for the Defence of the Individual, *Israel Bars Palestinians in Gaza from Moving to West Bank*.

children, elderly parents above the age of 65),”¹⁸³ the procedure gave discretion to the Coordinator of Government Activities in the Territories to grant a permit in the following circumstances:

A resident of Gaza who suffers from an ongoing (chronic) medical condition which require assistance by a family member who is a resident of the Judea and Samaria area, and who has no other family member (not necessarily of the first degree) who is a resident of Gaza and who is able to assist the patient.

A minor resident of Gaza who is under 16 years old, where one of his parents, who was a resident of Gaza, passed away and the other parent is a resident of the Judea and Samaria area and there is no other family relative who is a resident of Gaza who is able to take the minor under his wings. In the event that it is necessary, the nature and scope of the existing relationship with the parent who is a resident of the Judea and Samaria Area shall be examined in relation to the degree, nature and scope of the relationship with other family relatives in Gaza.

An elderly person (above the age of 65) who is a resident of Gaza and who is in a needy situation, which requires the handling and supervision of family relative who is a resident of the Judea and Samaria Area, who can assist him. In the event that it is necessary, the nature and scope of the existing relationship with the family relative who is a resident of the Judea and Samaria Area shall be examined in relation to the nature and scope of the relationship with other family relatives in Gaza.¹⁸⁴

Even under these strict conditions, only temporary permits to stay can be given, and these permits can only be renewed if the special humanitarian circumstances continue. For example, if the child whose parent in Gaza had passed away turns 16, his permit expires and is no longer staying legally in the West Bank.

In 2009, Israel stepped up its regulatory engineering by issuing a military order which amends the 1969 prevention of infiltration military order explained in Chapter 2 above. The amendment expanded the definition of “infiltrator” severely and somewhat vaguely, rendering anyone in the West Bank a potential infiltrator liable to criminal prosecution and deportation.¹⁸⁵

¹⁸³ *Procedure for Handling Applications by Gaza Strip Residents for Settlement in the Judea and Samaria Area.*

¹⁸⁴ Ibid.

¹⁸⁵ Al-Haq, *Al-Haq’s Legal Analysis of Israeli Military Orders 1649 & 1650: Deportation and Forcible Transfer as International Crimes*, Legal Analysis (Ramallah, Palestine: Al-Haq, October 13, 2010), 1–2, <http://www.alhaq.org/advocacy/topics/population-transfer-and-residency-right/299>; Amnesty International, *New Israeli Military Order Could Increase Expulsions of West Bank Palestinians*, Press Release, April 28, 2010, <http://www.amnesty.org/en/news-and-updates/new-israeli-military-order-could-increase-expulsions-west-bank-palestinians-2010-04>.

In 1969, the Prevention of Infiltration Military Order (number 329) defined the infiltrator as:

A person who entered the area knowingly and unlawfully after having been present in the east bank of the Jordan, Syria, Egypt or Lebanon following the effective date.¹⁸⁶

The amendment introduced in 2009 changed this definition into:

A person who entered the Area unlawfully following the effective date, or a person who is present in the Area and does not lawfully hold a permit.¹⁸⁷

As for evidence, section 5 of the year 2009 amendment states:

In any proceeding under this Order, a person is presumed to be an infiltrator if he is present in the Area without a document or permit which attest to his lawful presence in the Area without reasonable justification.

For the purpose of this section-

“A lawful document or Permit” –a document or permit issued by the commander of the IDF forces in the Judea and Samaria area or someone acting on his behalf under the provisions of security legislation, or issued by the authorities of the state of Israel under the entry into Israel law, 5712-1952, as it is periodically valid inside Israel, which permit the presence of a person in the Area.¹⁸⁸

The main obvious amendment in the new version of the order is that it expands the definition widely. Among the amendments, the new order deleted the reference to the “residents of the Area” and clearly reflected that its view of legality is having a permit from Israel, whether from the military authorities in the OPT or from the civil Israeli authorities. Clearly, this guarantees that if someone is accused of infiltration he cannot use his Palestinian Authority issued ID to prove his legal presence. As rightly noted by Asem Khalil, the deletion of the term “knowingly” from the definition will render many

¹⁸⁶ *Military Order Regarding Prevention of Infiltration (Judea and Samaria)(No.329), 5729, 1969*, English Translation is presented by HaMoked, available at: http://www.hamoked.org/files/2010/112300_eng.pdf.

¹⁸⁷ *Military Order Regarding Prevention of Infiltration (Amendment No. 2) (Judea and Samaria)(No. 1650) 5769-2009, 2009*, An English translation is presented by HaMoked, available at: http://hamokeden.red-id.com/files/2010/112301_eng.pdf.

¹⁸⁸ Ibid.

people whose status changed because of the speedy regulatory amendments, but who are not aware of this change, liable to be indicted as infiltrators.¹⁸⁹

The significance of using the “prevention of infiltration” tool is mainly that it transfers the illegalization of a Palestinian’s presence in the West Bank into criminal law. Just like following the 1948 and 1967 wars displaced returnees were criminalized, jailed and deported as infiltrators, the new 2010 amendment comes to criminalize new groups and make sure they will not be able to gain rights by staying in the West Bank without permit.

This amendment alarmed almost all of the relevant human rights organizations acting in the OPT¹⁹⁰ and a number of journalists.¹⁹¹ Those who analysed the order feared that while its text was vague enough to be able to indict literally anyone present in the West Bank, the fear was that Israel mainly targeted a number of groups, most importantly Palestinians whose registered address is Gaza, some of whom were actually born in the West Bank.¹⁹²

¹⁸⁹ A. Khalil, “Impact of Israeli Military Order No. 1650: On Palestinians’ Rights to Legally Reside in Their Own Country,” *European University Robert Schuman Centre for Advanced Studies CARIM Analytic and Synthetic Note* no. 2010/46 (2010): 3, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1675646.

¹⁹⁰ 23 Israeli and Palestinian Human Rights organizations signed a statement condemning the order. See, Adalah- The Legal Center for Arab Minority Rights in Israel et al., *Palestinian and Israeli Human Rights Groups Call for End to Israeli Military West Bank Deportation Policy*, May 13, 2010, http://www.btselem.org/press_releases/20100513; Amnesty International, *New Israeli Military Order Could Increase Expulsions of West Bank Palestinians*, Press Release, April 28, 2010, <http://www.amnesty.org/en/news-and-updates/new-israeli-military-order-could-increase-expulsions-west-bank-palestinians-2010-04>; Al-Haq, *Al-Haq’s Legal Analysis of Israeli Military Orders 1649 & 1650*; Al-Mezan Center for Human Rights, *Al Mezan: Israeli Military Order Enables IOF to Expel Palestinians from the West Bank; International Community Must Condemn Racist Order*, Press Release, April 2010, http://www.mezan.org/en/details.php?id=9974&ddname=Human%20Rights&id_dept=9&id2=9&p=center.

¹⁹¹ Amira Hass, “IDF Order Will Enable Mass Deportation from West Bank,” *Haaretz*, accessed October 27, 2012, <http://www.haaretz.com/print-edition/news/idf-order-will-enable-mass-deportation-from-west-bank-1.780>; Dani Izenberg, “New Law Could Deport Thousands of West Bank Palestinians,” *www.JPost.com*, April 13, 2010, <http://www.jpost.com/Israel/Article.aspx?id=172917>; Rory McCarthy, “Israeli Groups Fight Orders Allowing Army to Jail West Bank Residents,” *The Guardian*, April 11, 2010, <http://www.guardian.co.uk/world/2010/apr/11/israeli-groups-attack>; AlJazeera.net, “Isra’il Tatrud Filastinyeen Min Al-Daffa,” News, *Al-Jazeera.net*, April 11, 2010, <http://www.aljazeera.net/news/pages/edbc03a-3fd4-410a-98ac-f45d1d1ecde2>.

¹⁹² Adalah- The Legal Center for Arab Minority Rights in Israel et al., *Palestinian and Israeli Human Rights Groups Call for End to Israeli Military West Bank Deportation Policy*; Khalil, “Impact of Israeli Military Order No. 1650”; A. Abu Eid, “Military Order No. 1650 and Policy of Deporting Palestinians (Arabic)” (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1764254; Al-Haq, *Al-Haq’s Legal Analysis of Israeli Military Orders 1649 & 1650*.

In July 2010, HaMoked received statistical information from the Israeli army's "Coordinator of Activities in the Territories" about those Israel considers "illegal aliens" in the West Bank after filing a petition in the High Court under the Freedom of Information Act.¹⁹³ This information indicated that around 35,000 Palestinians were considered "illegal aliens" by the Israeli army because their registered address was Gaza Strip, but they were present in the West Bank.¹⁹⁴ Among these, 2,479 were actually born in the West Bank.¹⁹⁵

It should be stressed, however, that this law does not only target this population. The law can be used against other vulnerable groups who never managed to secure a status at the West Bank, most importantly foreign spouses of West Bank residents and other unwanted foreigners visiting the West Bank.¹⁹⁶

This military order was used frequently since it went into effect. It has been cited several times by the military authorities in the West Bank as the legal background for releasing prisoners whose sentence has expired to the Gaza, even if their families were in the West Bank.

3.7 Conclusion

It was evinced that Israel has been designing regulations that inflict forcible displacement upon the pretext of a Palestinian not having the right status that allows him/her to live in their homes. This conduct of the state has been used across the OPT, as well as in its sovereign areas. The patterns of displacement that the regulations inflict are numerous, consisting of displacement from the OPT or Israel to abroad; from Jerusalem or Israel to the West Bank or Gaza, and from the West Bank to Gaza. The victims of this displacement are hundreds of thousands.

¹⁹³ HaMoked, center for the Defence of the Individual, "Information Provided by COGAT to HaMoked Indicates That Some 35,000 Palestinians Who Live in the West Bank Were Labeled by Israel as 'Illegal Aliens' Liable for Expulsion, Because Their Registered Address Is in Gaza," July 6, 2010, <http://www.hamoked.org/Document.aspx?dID=Updates1038>.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Saed Bannoura, "Army To Arrest, Deport, Internationals Living In The West Bank," News, *International Middle East Media Center*, July 11, 2012, <http://www.imemc.org/article/63888>; Abu Eid, "Military Order No. 1650 and Policy of Deporting Palestinians (Arabic)," 13; Khalil, "Impact of Israeli Military Order No. 1650," 3.

Very frequently, Israel does not announce the regulations that inflict displacements, and does not provide the public with information about how many persons were displaced as a result of a specific policy. In fact, in most cases Israel does not recognize that its goal is to displace and usually uses the security pretext to justify the harm of its policies. As will be discussed in Chapter 5, these forms of denial of the truth have never been discussed as part of the Palestinian-Israeli peace process.

As the policies that revoke persons' statuses or prevent them from having one develop, the Israeli Supreme Court does not interfere to stop the government's and, in some cases, the Parliament's actions. On the contrary, it has been shown and analysed in more than one incident in this chapter how the court was actually part of the designing team. For example, it was the Supreme Court which brought forth the concept of "centre of life" to Jerusalem residents, a principle that has been used very frequently in order to displace more Palestinians in Jerusalem. Thus, no remedy has been yet given to the problems caused by status revocations or prevention. As will be shown in the following chapter, the regime designed by Israel to control the demographic balance is contrary to international law. There is a need for a comprehensive reparation scheme to redress the victims and stop these violations, as will be discussed in Chapter 5.

Chapter 4- The Legality of Forced Displacements in the Palestinian- Israeli Conflict

4.1 Introduction

It was explained in the Chapters 2 and 3 above that most of the forced displacements of the non-Jewish civilians from the areas Israel controlled in 1948 and in 1967 came as a result of three policies that were conducted simultaneously: the war operations, the prevention from a legal status that allows those displaced to reside legally in their homes, and the prevention from return through military and regulatory methods.

With the exception of the official opinion of the state of Israel and a number of contributors, there is a near consensus that these displacements are illegal. This chapter will examine the legality of the displacements according to several legal tools that are binding to the state of Israel. But in order to present a sound legal analysis, the chapter starts by defining the international legal framework that is applicable to the displacement incidents and the areas in which they occurred. This will be presented by determining the international legal status of Israel, the West Bank (including East Jerusalem) and Gaza Strip. Then, the applicability of relevant international legal instruments will be evaluated.

After setting this framework, this chapter will then examine Israel's policy of forcibly displacing Palestinians from its territory and from the OPT against applicable international legal norms. Because of the width of the scope of the policies and events that are subject to the analysis of this thesis, the legal analysis presented from this chapter has used a slightly different method if compared with relevant literature. While most of the literature would normally focus on one specific incident and present an analysis to it by demonstrating how it was contrary to different bodies of international

law,¹ this chapter has been divided into subsections relating to the wider categories under which Israel's displacements can be listed. These categories have been defined as the following actions taken by Israel (as presented in the previous chapters): (1) forced displacement; (2) revocation of legal status and (3) prevention from return. While there are many more norms of international law that Israel violated while implementing the policies above, the legal analysis presented below will only consider these three categories, which covers the scope of this study focusing on forced displacement itself and its essential elements.

4.2 The International Legal Framework in Israel and the OPT

The factual and legal analysis presented in Chapters 2 and 3 demonstrated that Israel has been intentionally and consistently displacing Palestinians within or beyond the geographical region of mandatory Palestine, which falls under two major *de facto* statuses: the territory that became under its sovereignty in 1948 and the one it occupied in 1967. In both territories, these displacements took place in times of war and peace; by the use of force and regulatory instruments; and on non-Jewish Israeli citizens and non-citizens. The legal framework, according to which Israel forcibly displaced the majority of the Palestinian population as explained Chapters 2 and 3, departed from the rules of international law and took the legislations of the Israeli parliament and the military orders of its military governors as its umbrella.

In order to examine the legality of Israel's forced displacement in international law, it is essential to first establish the applicability of relevant international legal instruments to Israel, the OPT, and the populations therein. This test requires a determination of the legal statuses of the areas under Israeli control in light of the principles of international law.

¹ See discussion in the literature review section in Chapter 1.

4.2.1 Relevant Historical Background

Up until 1917, Palestine was part of the enormous Sublime Ottoman State.² All Palestinians, regardless of their ethnic, national, or religious backgrounds, were Ottoman Citizens³ and the Ottoman Law was applicable in all of Palestine. After the defeat of the Ottomans in the First World War (hereinafter WWI), Palestine fell under the British military occupation, which was given by the League of Nations the Mandate Authority, under which it ruled Palestine until 1948. The post WWI mandates administered by France, Britain, and other victorious nations stated that they aimed to help the different nations under their rule for independence.⁴ However, in Palestine, the goal was quite different as the British Mandate was planning to facilitate establishing a “homeland for the Jews” in Palestine.⁵ This was a fulfilment of the Balfour declaration issued in 1917 stating:

His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine or the rights and political status enjoyed by Jews in any other country.⁶

² This state is also known, especially in the west, as the “Ottoman Empire.” Its name “Sublime Ottoman State” is its official name in Turkish and Arabic. In the rest of the chapter, it will be referred to as the “Ottoman State,” the “Ottoman Empire,” or as it appears in some international documents the “Turkish Empire.”

³ Ottoman citizenship applied on everybody residing within the borders of the Ottoman Empire since the establishment of the Citizenship Law of 1869. Prior to this law, citizenship was given according to religious status. All Muslims in the world were regarded subjects of the Ottoman empire, while non-Muslims were considered either as citizens or not according to their place of residence. Mutaz M. Qafisheh, “The International Law Foundations of Palestinian Nationality: a Legal Examination of Nationality in Palestine Under Britain’s Rule” (University of Geneva, 2007), 31–4.

⁴ See Article 22 of the Covenant of the League of Nations. The article describes the mandates as assistance to nations that fell under the sovereignty of defeated powers in the “recent war” (WWI) to stand as independent nations. The text that mentions nations that fell under the “Turkish Empire,” which includes Palestine, reads “Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.” League of Nations, “Covenant of the League of Nations,” April 28, 1919.

⁵ Henry Cattan, *Palestine and International Law: The Legal Aspects of the Arab-Israeli Conflict*, vol. Second (London: Longman, 1973), 15–9.

⁶ Arthur James Balfour to Lord Rothschild, “The Balfour Declaration,” November 2, 1917, http://news.bbc.co.uk/1/hi/in_depth/middle_east/israel_and_the_palestinians/key_documents/1682961.st

The British Mandate kept in place part of the Ottoman Legislations that had been applicable prior to it, and changed others.⁷ Of course, the laws that were applicable at that time extended to the whole area of Palestine. During that period, there was no difference between the areas we know now as Israel, West Bank, and Gaza Strip. The British re-structured the institutions of the state, including the courts and gave some relevant independence to two kinds of courts/ tribunals to solve local conflicts: Bedewen tribal courts in the Naqab/ Negev Desert, and local Jewish courts.⁸

In spite of all that, it is important to stress that at that time Palestine as a political entity falling under a transitional British mandate had one legal system, one body of courts to which anybody could refer, and an administration consisting of members of the mandatory power and local Palestinian citizens from most if not all of the communities that resided in Palestine.

In 1947, The United Kingdom informed the United Nations that it was willing to terminate its mandate by August 1948.⁹ The UN General Assembly created the United Nations Special Committee on Palestine (hereinafter UNSCOP) in May 1947 and requested that it would study the situation in Palestine and give its recommendations.¹⁰ Following the report submitted by this committee, the United Nations General Assembly adopted resolution 181,¹¹ which recommended to divide Palestine into a Jewish State and an Arab State, allocating nearly 54% to the Jews and 44% to the Arabs, and recommended Jerusalem (2% of Palestine, including Bethlehem according to their suggested plan) to be

m The Balfour Declaration, a letter sent from Lord Arthur James Balfour to Lord Rothschild, a leader of the Jewish community in Britain; in November 2nd, 1917. Original document is kept at the British Library.

⁷ The Brits made more amendments on Palestinian law compared to other regions under their mandate. While they kept in place the Civil Law known as the “Majallah,” most of the real estate laws of 1885, Insurance Law, and Societies Law, they introduced a lot of changes to the legal system including Criminal law, hundreds of legislations that regulate trade, and some amendments to the real estate laws. Feras Milhem, “The Origins and Evolution of the Palestinian Sources of Law” (PhD dissertation, Vrije Universiteit Brussel, 2004).

⁸ Assaf Likhovski, *Law And Identity in Mandate Palestine* (Univ of North Carolina Press, 2006).

⁹ UN General Assembly, “Resolution 181 (II) Future Government of Palestine,” November 21, 1947.

¹⁰ UN General Assembly, “Resolution 106,” May 13, 1947.

¹¹ UN General Assembly, “Resolution 181 (II) Future Government of Palestine,” 1947

administered internationally.¹² The population of the Jewish State would have been in this case 55% Jewish and 45% Arab.¹³

The main stream Arab political leadership and population in Palestine refused the division, while the main stream Jewish leadership and population (that were at the time only 30% of Palestine's population) accepted it.¹⁴ Following the UK's termination of its mandate over Palestine, the Zionist leadership announced the establishment of the state of Israel, and immediately a war erupted. The war resulted in the Jewish military militias conquer of 78% of Palestine, expelling the majority of the Arab population residing in it, and regarding it as the sovereign area of the state of Israel.¹⁵ The rest of Palestine, 22%, were an area located west of the Jordan river, and became called the "West Bank;" and a strip of land including cities and villages surrounding Gaza city that became called "Gaza Strip" were separated by what became Israel after the war. Political developments led the West Bank to join the Hashemite Kingdom of Jordan, and Gaza strip to be administered by Egypt.¹⁶

In 1967, another war erupted between Israel, Egypt, Jordan, and Syria in which Israel, the victorious party in the war, occupied lands belonging to or controlled by each of the defeated states, including the West Bank and Gaza Strip.¹⁷ Quickly after the occupation, Israel annexed East Jerusalem, and ruled the rest of the occupied territories under military rule, using military orders and courts, as shown in Chapters 2 and 3. In

¹² Ibid.

¹³ United Nations Special Committee on Palestine, *United Nations Special Committee on Palestine, Report to the General Assembly* (UN General Assembly, September 3, 1947), 48–75, A/364, Official Records of the Second Session of the General Assembly, <http://unispal.un.org/UNISPAL.NSF/0/07175DE9FA2DE563852568D3006E10F3> The Number of Jews and Arabs in the Jewish State to be were 498,000 and 407,000 respectively. In the Arab State to be, the numbers were 10,000 and 725,000. In Jerusalem, the numbers were 100,000 and 105,000. ; UN Committee on the Exercise of the Inalienable Rights of the Palestinian People, *The Origins and Evolution of the Palestine Problem: 1917-1988*, CEIRPP, DPR study (New York, June 30, 1990), <http://unispal.un.org/UNISPAL.NSF/0/D442111E70E417E3802564740045A309>.

¹⁴ Cattán, *Palestine and International Law: The Legal Aspects of the Arab-Israeli Conflict*, Second:15–19.

¹⁵ Mazen Qumsiyeh, *Sharing the Land of Canaan: Human Rights and the Israeli-Palestinian Struggle*, vol. 1st (Pluto Press, 2004), 35–6.

¹⁶ John Quigley, *The Case for Palestine: An International Law Perspective*, 2nd ed. (Durham & London: Duke University Press, 2005), 153–4.

¹⁷ Ibid., 161.

addition, it constructed Jewish settlements in the occupied territories, and created a special legal system for them so that the laws that apply on the Palestinian population would not apply to them. It did this by issuing military orders that copy the Israeli civil law and apply only to settlements,¹⁸ introducing special courts that only has jurisdiction in the settlements,¹⁹ and giving civil courts in Israel jurisdiction for civil and criminal matters in which Israeli settlers are involved.²⁰ With this framework in place, Israel governed the West Bank with two separate laws: one for the Jews and one for the Palestinians.

In 1993 a peace agreement was signed between the Palestine Liberation Organization (PLO) and Israel, creating a transitional semi-autonomous Palestinian authority in parts of the occupied territory “for a transitional period not exceeding five years, leading to a permanent settlement.”²¹ Despite the passage of almost 20 years since this agreement, the permanent settlement has not yet been reached.

In 2005, Israel unilaterally announced a “disengagement” from Gaza, and withdrew its land forces from there, but kept its control over the sea, air space, most of the land crossings, trade, taxes, and population registry.²² At the end of the year 2012, while the West Bank and Gaza were still under occupation, the UN General Assembly issued a resolution deciding to “accord to Palestine non-member observer State status in the United Nations.”²³

In order to examine the applicability of relevant international legal principles to the forced displacements explained in the previous chapters, it is essential to determine the legal statuses of the areas that fall under the Israeli civil and military jurisdiction. This

¹⁸ Eyal Benvenisti, *Legal Dualism: The Absorption of the Occupied Territories into Israel*, The West Bank Data Base Project (Boulder, Co: Westview Press, 1990), 7.

¹⁹ Ibid., 8–16.

²⁰ Ibid., 23.

²¹ Israel and Palestine Liberation Organization, “Declaration of Principles on Interim Self-Government Arrangements” (Signed in Washington DC, September 1993), Article 1.

²² Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, 2009), 14–15; Kathleen Cavanaugh, “The Israeli Military Court System in the West Bank and Gaza,” *Journal of Conflict and Security Law*, *Oxford University Press Journals* 12, no. 2 (2007): 199; Sari Bashi and Kenneth Mann, *Disengaged Occupiers: The Legal Status of Gaza* (Gisha, Legal Center for Freedom of Movement, 2007), 8; Yuval Shany, “Faraway, So Close: The Legal Status of Gaza After Israel’s Disengagement,” *Yearbook of International Humanitarian Law* 8 (2005): 369.

²³ UN General Assembly, “Resolution 67/19,” November 29, 2012.

will lay the ground for understanding where each body of international law applies. The following subsection will discuss the two relevant international legal statuses that emerged from the 1948 and 1967 wars.

4.2.2 The International Legal Statuses of Israel and the OPT and the Applicability of relevant International Legal Instruments

Up until the UN General Assembly resolution 181, the legal status of Mandatory Palestine was, arguably, simple. It was, *de jure*, a strip of land cut out from the former Ottoman State, put under mandate, qualified to be independent as soon as the mandate ends.²⁴ However, the fact was that Britain had been shaping a different future scenario for Palestine made a difference. The League of Nations, and later the United Nations, recognized Britain's goal to create a Jewish homeland in Palestine.²⁵ Although this goal can be argued illegal, because neither the United Kingdom nor the League of Nations, and then the United Nations, had sovereignty over any of the lands placed under mandate,²⁶ and because the goal of the mandate in all the other designated areas was to merely prepare for the independence of nations falling under it,²⁷ the development of events has lead to effectively creating two nations in Palestine, one of which was a minority formed of new immigrants who aimed at forming their own independent state. General Assembly Resolution 181 came to respond to this fact, and recommended the partition of Palestine.

²⁴ This view is supported by the principles expressed in Article 22 of the League of Nations Covenant. It is also confirmed by the mandate practice in other states. League of Nations, "Covenant of the League of Nations"; In support of this view, another proposal for the "Question of Palestine" was proposed, calling for the mere independence of Palestine after the end of the British mandate, but as a federal state as opposed to a simple state. Obviously, this proposal was not adopted by UNGA. UN Committee on the Exercise of the Inalienable Rights of the Palestinian People, *The Origins and Evolution of the Palestine Problem: 1917-1988*.

²⁵ United Nations Special Committee on Palestine, *United Nations Special Committee on Palestine, Report to the General Assembly*, para. 68.

²⁶ Henry Cattán argues that there is nearly a consensus among international law scholars that the mandate powers do not possess any sovereignty on the territories they administer. It is rather seen that the sovereignty is in the hands of the peoples under mandate, but that exercising this sovereignty is delayed by the existence of that mandate. Henry Cattán, "The Status of Jerusalem Under International Law and United Nations Resolutions," *Journal of Palestine Studies* 10, no. 3 (1981): 6; Cattán, *Palestine and International Law: The Legal Aspects of the Arab-Israeli Conflict*, Second:116–20.

²⁷ League of Nations, "Covenant of the League of Nations," Article 22.

As mentioned above, the development of history has led to Israel being created first on 78% of mandatory Palestine, and then to it occupying the rest in 1967. Because of this, different parts of mandatory Palestine ended up having different statuses, and are now divided into Israel and the OPT (West Bank and Gaza Strip). The next two sections will discuss the legal status of each of these territories.

4.2.2.1 Israel's International Legal Status and the applicability of international law

Israel has existed as a state since its declaration of independence during the 1948 war. It has been recognized as such by the majority of the states, and has become a member of the United Nations in 1949, in a resolution that noted that Israel was expected to implement UN General Assembly resolution 181 and accept the return of the Palestinian refugees.²⁸

However, the problem that rises is that Israel has never been recognized in specific borders especially that it has never defined them. More specifically, it never clarified what it considers to be not-Israel. To elaborate this point, there is a need to review the developments that ended up shaping Israel's multiple border conceptions. Firstly, when the UN General Assembly took the decision to partition Palestine into two states, Israel was intended to be on 54% of the total area of mandatory Palestine.²⁹ However, by the end of the 1948 war, Israel managed to control 78% of Palestine and then signed armistice agreements with the forces fighting it, mainly Jordan,³⁰ Lebanon,³¹ Syria,³² and Egypt.³³ In these agreements, ceasefire lines were drawn between the newborn state and its neighbours to announce the truce. It was agreed in the Rhodes Agreement between Israel and Jordan that these lines were agreed upon without "prejudice to future territorial

²⁸ UN General Assembly, "Resolution 273 (III)," May 11, 1949.

²⁹ UN General Assembly, "Resolution 181 (II) Future Government of Palestine," 1947.

³⁰ Israel and Jordan, "Hashemite Jordan Kingdom-Israel: General Armistice Agreement" (Rhodes, April 3, 1949).

³¹ Israel and Lebanon, "Lebanese-Israeli General Armistice Agreement" (Rhodes, March 23, 1949).

³² Israel and Syria, "Israeli-Syrian General Armistice Agreement" (Rhodes, July 20, 1949).

³³ Israel and Egypt, "Egyptian-Israeli General Armistice Agreement" (Rhodes, February 23, 1949).

settlements or boundary lines or to claims of either Party relating thereto."³⁴ Nonetheless, Israel annexed the territories that it controlled during the war by extending its civil and judicial jurisdiction to these lines, and treated everything on its side of the lines as part of its sovereign territory.³⁵ Since then, Israeli law and judiciary have had civil domestic jurisdiction within these lines.

In the aftermath of the 1967 war and the Israeli occupation of the rest of Palestine and parts of Syria and Egypt, Israel annexed two territories: East Jerusalem and the Syrian Golan Heights.³⁶ As will be discussed below, this step was never recognized, and was widely condemned by the UN General Assembly and Security Council alike³⁷ and declared as illegal by the international court of Justice.³⁸ This annexation and its legal implications will be discussed further in the next section, but it suffices here to stress that the new de facto borders of Israel in the aftermath of the occupation have not gained any recognition.

In 1993, Israel and the PLO signed an interim peace agreement according to which borders were among the final status issues.³⁹ Until such agreement is reached, it is not conceivable that any borders of Israel can be final.

³⁴ Israel and Jordan, "Hashemite Jordan Kingdom-Israel: General Armistice Agreement," Article VI(9).

³⁵ In 1948 while the war was still ongoing, Israel enacted an ordinance that proclaimed Israeli civil jurisdiction in any area in Palestine that its army controls. The ordinance stated: Any law applying to the whole of the state of Israel shall be deemed to apply to the whole of the area including both the area of the state of Israel and any part of Palestine which the minister of defense has defined by proclamation as being held by the Defense Army of Israel. Any person or body of persons competent by virtue of a law as aforesaid to hold office or act in the whole of the state of Israel shall be deemed to be competent to hold office or act in the whole of the area including both the area of the state of Israel and any part of Palestine which the Minister of Defense has defined by proclamation as being held by the Defense Army of Israel. This Ordinance shall have effect retroactively as from the 6th Iyar, 5708 (15th May, 1948), and all acts done which, but for the provisions of this Ordinance, would be without effect are hereby validated retroactively. See, State of Israel, *Area of Jurisdiction and Powers Ordinance*, 1948.

³⁶ Eyal Benvenisti, *The International Law of Occupation* (Princeton, N.J.; Chichester: Princeton University Press, 1993), 113–4.

³⁷ UN General Assembly, "Resolution 2253," July 4, 1967; UN Security Council, "Resolution 478," August 20, 1980; UN Security Council, "Resolution 252," May 21, 1968; UN Security Council, "Resolution 267," July 3, 1969; UN Security Council, "Resolution 298," September 25, 1971, UN Security Council, "Resolution 298," 25 September 1971.

³⁸ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 74–8 (ICJ Advisory Opinion 2004).

³⁹ Israel and Palestine Liberation Organization, "Declaration Of Principles On Interim Self-Government Arrangements", Article V(3).

Despite the ambiguity of Israel's borders, Israel is bound by customary international law to which every other state is bound. In addition, it is legally obliged to implement the provisions of any treaty it signed and ratified. The Vienna Convention on the Law of Treaties clarifies this obligation, and expresses that every state must perform treaties it ratifies "in good faith,"⁴⁰ and that "a treaty is binding upon each party in respect of its entire territory."⁴¹

While Israel does not dispute the applicability of treaties and conventions it ratified on its sovereign territory, the same is not true concerning the OPT. This will be discussed in the following section.

4.2.2.2 The Status of the Areas Israel Occupied in 1967 and the Applicability of Relevant International Law

The status of the areas militarily captured by Israel in the 1967 war has been widely considered as occupied territories. International humanitarian law (IHL), which is the branch of international law that specializes with regulating armed conflict and occupation, has provided the principles that are applicable to occupation. Article 42 of the 1907 Hague Regulations states that "a territory is considered occupied when it is actually placed under the authority of the hostile army;"⁴² and that the occupation extends "to the territory where such authority has been established and can be exercised."⁴³ This article is the main legal reference for setting the status of the West Bank including east Jerusalem and Gaza since the Israeli army took control of them in 1967.⁴⁴ The international recognition of this status will be elaborated below, but it is important first to put this into

⁴⁰ United Nations, "Vienna Convention on the Law of Treaties" (Vienna, May 23, 1969), United Nations, Treaty Series, vol. 1155, p. 331, Article 26.

⁴¹ Ibid. Article 29.

⁴² "Convention Respecting the Laws and Customs of War on Land" (Hague, October 18, 1907), Article 42.

⁴³ Ibid.

⁴⁴ Arai argues that if the occupying power refrains to proclaim a territory as occupied, whether because it annexed this territory or for any other reason, this failure is irrelevant to the status of the territory. See, Yutaka Arai, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction With International Human Rights Law* (Leiden and Boston: Martinus Nijhoff Publishers, 2009), 10–2.

context, by explaining Israel's view on the status of the OPT, and as such, the applicability of relevant international legal instruments there.

Article 2 of the Fourth Geneva Convention (hereinafter: GCIV) states that "the Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."⁴⁵ Israel, Jordan, and Egypt had all ratified GCIV prior to the 1967 war.⁴⁶ Therefore, the treaty applies to both the West Bank and Gaza Strip, as a result of their occupation status.

However, Israel refrained from treating that territory as occupied, and alternatively introduced more complex divisions and definitions that resulted in its failure to apply international legal principles relevant to the occupied territory. Soon after the occupation was complete, Israel annexed East Jerusalem and introduced a doctrine according to which the rest of the occupied territory was governed as "administered territory" as opposed to occupied, as will be explained below.

The annexation of East Jerusalem took place by introducing legal amendments to the Israeli law.⁴⁷ In the first amendment, Israel legalized (according to its own law) the extension of Israeli legal and judicial jurisdiction over any part of "Eretz-Yisrael" (translated as "the land of Israel" which is a concept including all of mandatory Palestine, including the OPT) with a single government cabinet decree.⁴⁸ The following day after this legislation the Israeli government issued a decree that expanded the state's legal and judicial jurisdiction in East Jerusalem.⁴⁹ By this legal amendment and government decree, Israel expanded its legal and judicial jurisdiction over 72,000⁵⁰ Dunams.⁵¹ Then Israel

⁴⁵ "Convention (IV) Relative to the Protection of Civilian Persons in the Times of War" (Geneva, August 12, 1949) Article 2.

⁴⁶ "List of State Parties of the Fourth Geneva Convention," *ICRC Website*, accessed January 7, 2013, <http://www.icrc.org/IHL.nsf/WebSign?ReadForm&id=375&ps=P>.

⁴⁷ Dinstein, *The International Law of Belligerent Occupation*, 18–9; Usama Halabi, "Legal Status of the Population of East Jerusalem Since 1967 and the Implications of Israeli Annexation on Their Civil and Social Rights," in *43 Years of Occupation: Jerusalem File*, ed. Civic Coalition, 2nd ed. (Jerusalem: Civic Coalition for Palestinian Rights in Jerusalem, 2011), 11–2; Usama Halabi, *The Legal Status of Jerusalem and its Arab Citizens*, 2nd ed. (Jerusalem: Institute for Palestine Studies, 1999), 10–2; Benvenisti, *The International Law of Occupation*, 112–3.

⁴⁸ *Law to Amend the Legal and Judicial Jurisdiction of the State of Israel*, 1967.

⁴⁹ Halabi, *The Legal Status of Jerusalem and its Arab Citizens*, 10.

⁵⁰ *Ibid.*

⁵¹ 1 dunam in Palestine is equal to 1,000 square meters (10,764 sq ft).

annexed East Jerusalem to the West Jerusalem municipality, and dismantled the Palestinian municipal council.⁵²

In 1980, Israel enacted a basic law called *Basic Law: Jerusalem, Capital of Israel* in which it declared in paragraph 1 that Jerusalem “complete and united is the capital of Israel.”⁵³ In paragraphs 5, the basic law stated that the jurisdiction of the city includes the areas annexed in 1967, and in paragraph 6 it prohibited any transfer of “authority...stipulated in the law of the State of Israel or of the Jerusalem Municipality” to any “foreign body.”⁵⁴

In fact, the law enacted in 1980 did not impose any new changes to the status of East Jerusalem according to the Israeli law, but rather confirmed the effect of the laws enacted in 1967, and had more of a political declaratory purpose.⁵⁵ In the words of the Israeli Knesset website, this law aimed, *inter alia*, to “secure its [Jerusalem’s] integrity and unity and concentrate all the instructions which were scattered in various laws.”⁵⁶ The practical implication of this annexation is that it means that Israel does not consider or treat Jerusalem as occupied, but rather as an integral part of the sovereign territory of the state. As such, Israel considers that international humanitarian law does not apply in the city. The Israeli judiciary, having to work by the law of the state of Israel, follows this approach and applies only Israeli law to every case that comes to it, regardless of international law.⁵⁷ Of course, any attempt to apply international humanitarian law, especially the rules that regulate occupation fails. In the *Rabah* case, the Israeli Supreme Court was asked to apply The Hague Regulations and GCIV to an East Jerusalem case, but it refused such application providing the justification that if internal Israeli law contradicts

⁵² Halabi, *The Legal Status of Jerusalem and its Arab Citizens*, 12.

⁵³ *Basic Law: Jerusalem, Capital of Israel*, Published in Sefer Ha-Chukkim No. 980 of 5th August, 1980, P. 186, 1980.

⁵⁴ Ibid.

⁵⁵ Benvenisti, *The International Law of Occupation*, 113.

⁵⁶ Israeli Knesset, “The Existing Basic Laws : Summaries,” *Israeli Knesset Website*, accessed January 7, 2013, http://www.knesset.gov.il/description/eng/eng_mimshal_yesod2.htm#6.

⁵⁷ See, e.g., HCJ, 282/88 - ‘Awad v Yitzhak Shamir, Prime Minister and Minister of Interior et al. Judgment, 7–10 (HCJ 1988).

with international law, internal law prevails.⁵⁸ As the court noted, the annexation of East Jerusalem was a constitutionally stipulated principle, and the court found that it applies even if it was contrary to international law.⁵⁹

The rest of the territory that Israel occupied in 1967 was not officially annexed. However, the status of the Palestinian territories that Israel controlled in 1967 and the applicability of international humanitarian law has been an issue of dispute between Israel and the international community.⁶⁰ While every international organ has referred to the areas Israel controlled after the war of 1948 as “occupied territory,” Israeli governments did not fully recognize this simple status and attempted to present a more complex analysis of what the status is as will be shown below.

Soon after the occupation, Israel announced that it was bound by The Hague Regulations and the GCIV.⁶¹ However, it later amended its announcement by excluding GCIV from applicability.⁶² According to Kretzmer, this was due to the quickly changing political stance of many Israeli politicians, who preferred to refer to the territories occupied by Israel as “liberated.”⁶³ Lisa Hajjar explains that this was the case so that Israel would be able to annex some or all of the occupied territory.⁶⁴

In 1968, Yehuda Blum, a professor at the Hebrew University in Jerusalem who later served as the Israeli Ambassador at the United Nations, brought forth an argument that became the basis of the official Israeli position on the status of the occupied territories. His main argument in this regard was based on his assumption that international humanitarian law rules are there to serve two goals, namely, (a) safeguarding

⁵⁸ HCJ 256/01, Rabah v. Jerusalem Court for Local Matters et al., PD 930-35, 5–7 (Israeli Supreme Court 2002).

⁵⁹ Ibid.

⁶⁰ See discussion below.

⁶¹ *Order Concerning Security Instructions (Gaza Strip), 1967 (Annex to: Proclamation Concerning the Beginning of the Validity of Special Order Off Security Instructions (Gaza and Northern Sinai) (No. 3), 1967), Published in Proclamations, Orders and Appointments (Israeli Occupation - Gaza Strip), Issue No.1, 14 September 1967, P. 11, 1967, Available at: <http://muqtafi.birzeit.edu/en/>, Article 35.*

⁶² Cavanaugh, “The Israeli Military Court System in the West Bank and Gaza,” 203.

⁶³ David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (SUNY Press, 2002), 32.

⁶⁴ Lisa Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (Berkeley: University of California Press, 2005), 54.

humanitarian rights of the population under occupation; and (b) protecting the “reversionary rights” of the legitimate sovereign.⁶⁵ The argument continues that

Since the Kingdom of Jordan never had the status of a legitimate sovereign over Judea and Samaria, the rules of International Law limiting the occupant’s right with a view to safeguarding the reversionary rights of the legitimate sovereign have no application as against Israel with regard these territories. This proceeds, of course, on the assumption that Israel control of these territories is not unlawful.⁶⁶

In other words, since Blum’s claim is that Jordan had no legitimate title in the West Bank, then Israel is only obliged to guarantee the humanitarian rights of the population, but has no obligation to commit to other principles of international humanitarian law.

Following on this logic, the Israeli government’s position has been that the status of “Judea, Samaria, [i.e. West Bank excluding annexed Jerusalem] and Gaza” has been *sui generis* (not Israeli, nor occupied).⁶⁷ Meir Shamgar, known as the architect of the legal system installed in the occupied territories after the occupation,⁶⁸ published an article in 1971 (when he served as Israel’s Attorney General), based on Blum’s theory denying the *de jure* applicability of the Fourth Geneva Convention, and explaining the Israeli government position regarding this convention. He wrote,

[T]he government of Israel distinguished between the legal problem of the applicability of the Fourth Convention to the territories under consideration which... does not in my opinion apply to these territories, and decided to act *de facto*, in accordance with the humanitarian provisions of the Convention.⁶⁹

In other words, Shamgar denied that the GCIV was *de jure* applicable to the occupied territories, and clarified that the government accepted, *de facto*, to apply

⁶⁵ Yehuda Z. Blum, “Missing Reversioner: Reflections on the Status of Judea and Samaria, The,” *Israel Law Review* 3 (1968): 293–4.

⁶⁶ *Ibid.*, 301.

⁶⁷ Nissim Bar-Yaacov, “Applicability of the Laws of War to Judea and Samaria (The West Bank) and to the Gaza Strip, The,” *Israel Law Review* 24 (1990): 485.

⁶⁸ Meir Shamgar also served as Israel’s Military Advocate General between 1961-68; a Defense Ministry Advisor in 1968, Israel’s Attorney General between 1968-75, and a Supreme Court Justice and later the president of the Israeli Supreme Court 1975-1995. “Meir Shamgar,” *Israeli Ministry of Foreign Affairs*, accessed January 7, 2013, http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1998/9/Meir+Shamgar.htm.

⁶⁹ Meir Shamgar, “The Observance of International Law in the Administered Territories,” in *Israel Yearbook on Human Rights* (1971), ed. Yoram Dinstein, vol. 1 (Martinus Nijhoff Publishers, 1989), 266.

humanitarian provisions. The official governmental position of Israel has been explained to be based on Article 2 of the GCIV which states:

In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.⁷⁰

The government's position argues that the convention only applies when the territory occupied belongs to a "High Contracting Party." Since Israel did not recognize the legitimacy of Egypt's and Jordan's presence in Gaza and the West Bank, then its control over the territories is not occupation of a territory of a high contracting party. Therefore, the convention does not apply, according to the Israeli government.⁷¹

The Israeli Supreme Court's position, on the other hand, developed over time. While at the beginning of the occupation it refrained from deciding whether the conventions were enforceable through the domestic judiciary, it later developed jurisprudence according to which only customary international law was enforceable through the court.⁷² The Hague regulations were considered as a whole reflecting customary legal principles, while the Geneva Conventions were not in their entirety reflective of customary law.⁷³ According to the Supreme Court, for the GCIV to be enforceable by the court, it needs to be enacted by a domestic law by the legislator, an act that has not been done by the Israeli Knesset or by the military commander in the occupied territories.⁷⁴ Thus, the Geneva Conventions were not enforceable in the court, except those provisions that were considered customary norms by the court, which are examined in a case by case basis. This position was explained by Justice Aharon Barak of the Israeli Supreme Court in a land confiscation case in the West Bank in 1982 where his judgment provided:

⁷⁰ "Convention (IV) Relative to the Protection of Civilian Persons in the Times of War" Article 2.

⁷¹ Kretzmer, *The Occupation of Justice*, 33–4.

⁷² Ibid., 36.

⁷³ Ibid.

⁷⁴ Ibid., 40–1.

Although The Hague Regulations are treaty, the accepted opinion—and this opinion has been accepted by this court— is that The Hague regulations are declarative by nature and reflect customary international law which applies in Israel even in the absence of an Israeli legislative act. This is not the case regarding the Geneva Convention relative to the Protection of Civilian Persons in Times of War 1949, which even if it applies to Israel's belligerent occupation in Judea and Samaria -and this question is bitterly disputed and we shall not express any opinion on it—indeed it is principally a constitutive treaty which does not adopt existing international practices, but rather creates new norms, which, in order to be applied to Israel, require a legislative act.⁷⁵

While judge Barack refrained from expressing any clear opinion concerning the *de jure* applicability of the Geneva Convention, he expressed that he would not build his decisions on the convention itself because, according to the position of the Supreme Court, it is not part of customary international law. The court has been consistent on this position until the current day. For example, after Israel built its wall in the West Bank which was declared as illegal by the ICJ, a case was considered in the Israeli Supreme Court in order to examine the route of the wall around a Palestinian village. In its judgment, the court stated,

The law of belligerent occupation is also laid out in IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (...) The State of Israel has declared that it practices the humanitarian parts of this convention. In light of that declaration on the part of the government of Israel, we see no need to reexamine the government's position. We are aware that the Advisory Opinion of the International Court of Justice determined that The Fourth Geneva Convention applies in the Judea and Samaria area, and that its application is not conditional upon the willingness of the State of Israel to uphold its provisions. As mentioned, seeing as the government of Israel accepts that the humanitarian aspects of The Fourth Geneva Convention apply in the area, we are not of the opinion that we must take a stand on that issue in the petition before us.⁷⁶

So, even though the judge noticed the fact that the ICJ's advisory opinion declared that the GCIV applies in its entirety to the OPT, it still refrained from accepting to enforce it, and sustained the position that refuses to reexamine the government's position.

⁷⁵ HCJ 393/82, Jam'iat Iskan Al-Ma'almoun Al-Mahduda Al-Mauliya [Cooperative Association for teachers housing] vs. Commander of the IDF Forces in the Area of Judea and Samaria, 11 (Israeli Supreme Court 1983).

⁷⁶ HCJ 7957/04, Mara'be v. The Prime Minister of Israel, 14 (HCJ 2005).

Similarly, in the case known as the *Targeted Killings* case the court sustained a similar opinion. Judge Barack wrote,

Alongside it stands The Fourth Geneva Convention (...) Israel is party to that convention. It has not been enacted through domestic Israeli legislation. However, its customary provisions constitute part of the law of the State of Israel (see the judgment of Cohen, J. in HCJ 698/80 Kawasme v. The Minister of Defense, 35(1) PD 617, 638, hereinafter Kawasme). As is well known, the position of the Government of Israel is that, in principle, the laws of belligerent occupation in The Fourth Geneva Convention do not apply regarding the area. However, Israel honors the humanitarian provisions of that convention. That is sufficient for the purposes of the petition before us.⁷⁷

Again, judge Barack decided not to reexamine the applicability of the GCIV to the OPT, and preferred to note that Israel's acceptance of the humanitarian provisions of the convention is sufficient for the case. Furthermore, in reaching his conclusion, the judge cited the "*Kawasme* case" in which the court approved the deportation of civilians on the basis that the article that prohibits such deportations (Article 49) is not part of customary international law.⁷⁸ Thus, by citing this case, the Supreme Court judge has affirmed the court's position of failing to enforce the GCIV.

Al-Haq, a human rights organization based in the OPT, indicated that the practical result of the court's position is that:

the court is only authorized to examine the activities of Israeli military authorities in light of the provisions of the Fourth Geneva Convention only where the state Attorney agrees to their application, thereby rendering the position taken by the court without substantial significance.⁷⁹

As the Palestinian human rights lawyer and author Raja Shehadeh argues, by the court's decision to only consider The Hague regulations and not the GCIV in any case it allows itself to be "another instrument that lends legal validity to actions by the government which are in essence illegal."⁸⁰

⁷⁷ HCJ 769/02, PCATI et al v. The Government of Israel et. al. (Targeted Killing Case), 20 (HCJ 2006).

⁷⁸ HCJ 698/80, Kawasme et al v. The Minister of Defence et al. (1981).

⁷⁹ Rubā Sālim, *Al-Haq: 25 Years Defending Human Rights (1979-2004): Waiting for Justice* (Al-Haq, 2005), 38.

⁸⁰ Raja Shehadeh and Law in the Service of Man, *Occupier's Law: Israel and the West Bank*, Rev. ed (Washington, D.C: Institute for Palestine Studies, 1988), 107.

In conclusion and summary of what has been explained above, Israel upon its occupation claimed two types of statuses in the OPT: Annexed and administered territories. The first was assigned to East Jerusalem, and it practically meant that the Israeli legal, judicial and administrative jurisdiction is fully applicable to it; and that international humanitarian law including the law of occupation was not enforceable there. The rest of the OPT was assigned the status of “administered territory” and Israel considered that only humanitarian provisions of IHL were applicable. The Israeli Supreme Court has never challenged these statuses and legal definitions.

These assigned statuses and the policies that resulted from them have not been recognized by the international community. Since the early stages of Israel’s control of the West Bank and Gaza, different international bodies referred to it as occupied. For instance, in November 1967, the UN Security Council issued a resolution stating that any future peace “should include... withdrawal of Israel armed forces from territories *occupied* in the recent conflict.”⁸¹ [emphasis added] In 2004, the International Court of Justice (ICJ) in its advisory opinion on the wall constructed by Israel in the West Bank referred to Article 42 of the Hague Convention of 1907 and concluded that:

The territories situated between the Green Line and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power... All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.⁸²

Based on the status of all the territories captured by Israel in 1967 war as occupied, it follows that the annexation of any such territory is illegal. This conclusion can be reached by reference to Article 2 paragraph 4 of the UN Charter stating that: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”⁸³ Furthermore, IHL forbids the change of the local laws by the occupying power unless necessary for

⁸¹ UN Security Council, “Resolution 242,” November 22, 1967.

⁸² International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, 78 (ICJ Advisory Opinion 2004), para. 78.

⁸³ United Nations, “Charter of the United Nations,” October 24, 1945, Article 2.

legitimate needs linked to the security or restoring order in the occupied territory.⁸⁴ This principle was codified in Article 43 of the Hague regulations which states that the occupying power shall ensure public order and safety “while respecting, unless absolutely prevented, the laws in force in the country.”⁸⁵ GCIV has also stated that “the penal laws of the occupied territory shall remain in force.”⁸⁶

The Security Council has affirmed in several occasions that the annexation of East Jerusalem was illegal. In 1968, it issued a resolution that referred to the inadmissibility of acquisition of territory by military consequences, and determined that it:

Considers that all legislative and administrative measures and actions taken by Israel, including expropriation of land and properties thereon, which tend to change the legal status of Jerusalem are invalid and cannot change that status.⁸⁷

In 1980, after Israel adopted its basic law Jerusalem the Capital of Israel mentioned above, the UN Security Council determined that all these measures taken by Israel to alter the status of Jerusalem are “null and void.”⁸⁸ Based on the considerations mentioned above, the ICJ confirmed this conclusion in its 2004 Advisory Opinion, deciding that “subsequent events in these [occupied] territories... have done nothing to alter this situation [i.e. their status as occupied].”⁸⁹

Since the West Bank including East Jerusalem and Gaza Strip have both been considered occupied, IHL is fully applicable to them. Article 2 of the GCIV, mentioned above, states that it applies to occupied territory.⁹⁰ A conference of the “High Contracting Parties on the Geneva Conventions” declared that “[t]he participating High Contracting Parties reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem.”⁹¹ The International Committee of the Red

⁸⁴ This will be discussed further in Section 4.3.2.2 below.

⁸⁵ “Hague Convention of 1907” Article 43.

⁸⁶ “Convention (IV) Relative to the Protection of Civilian Persons in the Times of War,” 64, Article .

⁸⁷ UN Security Council, “Resolution 252,” of 21 May 1968.

⁸⁸ UN Security Council, “Resolution 478,” of 20 August 1980.

⁸⁹ International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, 78 (ICJ Advisory Opinion 2004), para. 78.

⁹⁰ “Convention (IV) Relative to the Protection of Civilian Persons in the Times of War”, Article 2.

⁹¹ Declaration of the Conference of High Contracting Parties to the Fourth Geneva Convention, 5 December 2001, paragraph 1, available at <http://domino.un.org/unispal.nsf/0/8fc4f064b9be5bad85256c1400722951?OpenDocument>

Cross also affirmed this applicability repeatedly. It stated in 2001 that “the ICRC has always affirmed the *de jure* applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem.”⁹² This position is also consistent with UN Security Council resolutions.⁹³ For example, in Resolution 271 of 1969 it called upon Israel to “observe the provisions of the Geneva Conventions and international law governing military occupation.”⁹⁴ In Resolution 446, it affirmed that the GCIV “is applicable to Arab territories occupied by Israel since 1967 including Jerusalem.”⁹⁵ It further called upon Israel to

abide scrupulously by the 1949 Fourth Geneva Convention, to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem.⁹⁶

Similarly, the UN General Assembly adopted the same position,⁹⁷ and all relevant documents issued by UN agencies treated the territories captured by Israel in 1967 as occupied and used the GCIV as part of their legal framework.⁹⁸ The majority of the world's states and legal scholars have not accepted Israel's position on the applicability of the Geneva Conventions.⁹⁹

⁹² ICRC, *Implementation of the Fourth Geneva Convention in the Occupied Palestinian Territories: History of a Multilateral Process (1997-2001)* (Geneva: ICRC), accessed January 7, 2013, <http://www.icrc.org/eng/resources/documents/misc/5fldpj.htm#2>.

⁹³ UN Security Council, “Resolution 271,” September 15, 1969; UN Security Council, “Resolution 446,” March 22, 1979; UN Security Council, “Resolution 681,” December 20, 1990; UN Security Council, “Resolution 799,” December 18, 1992.

⁹⁴ UN Security Council, “Resolution 271,” of 15 September 1969.

⁹⁵ UN Security Council, “Resolution 446,” 22 March 1979.

⁹⁶ Ibid.

⁹⁷ UN General Assembly, “Resolution 56/60,” December 10, 2001; UN General Assembly, “Resolution 58/97,” December 17, 2003.

⁹⁸ Examples of such documents are numerous. For example all reports issued by the United Nations Office for the Coordination of Humanitarian Affairs discussing the occupation refer to the Fourth Geneva Convention as their legal reference to examine the legality of alleged human rights violations conducted by Israel, the occupying power, in the OPT. See, e.g., UN OCHA, *East Jerusalem: Key Humanitarian Concerns* (Office for the Coordination of Humanitarian Affairs (OCHA), 2011), http://www.ochaopt.org/documents/ocha_opt_jerusalem_report_2011_03_23_web_english.pdf. This report cites the GCIV as part of the legal framework in Jerusalem.

⁹⁹ Cavanaugh, “The Israeli Military Court System in the West Bank and Gaza,” 203; Richard A. Falk and Burns H. Weston, “The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada,” *Harvard International Law Journal* 32 (1991): 141.

In 2004, the International Court of Justice, in its advisory opinion about the wall that Israel has been building in the West Bank, reaffirmed this conclusion. In Paragraph 101 of its Advisory Opinion, the Court provided:

The Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that the Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, *there being no need for any enquiry into the precise prior status of those territories*.¹⁰⁰

The court's opinion has helped in determining the criteria on which one can consider the Fourth Geneva Convention applicable. Particularly, it determined that there is no need to enquire into the status of the occupied territory prior to Israel's occupation. Although this decision came to cover only the West Bank, a similar conclusion can be driven for Gaza Strip. The court in this case gave an authoritative answer to the Israeli argument, based on Blum's and Shamgar's work, that the GCIV is not applicable because of Israel's denial of the legitimacy of Jordan's and Egypt's authorities in the West Bank and Gaza respectively.

In conclusion, while Israel, represented by its government and judiciary, has failed in meeting its obligations to recognize the applicability to the GCIV and to implement its provisions in the areas it occupies, this position has been consistently declined by the international community. This means that the legal system Israel implemented in Jerusalem, and that significant parts of the military regime applied to the West Bank and Gaza contradict with international humanitarian law.

It remains to examine the applicability of international human rights treaties that Israel ratified to the occupied territory. Israel has signed and ratified the International Covenant on Civil and Political Rights (ICCPR);¹⁰¹ the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁰² the Convention on the Elimination of All Forms of Racial Discrimination (CERD),¹⁰³ the

¹⁰⁰ International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, 101 (ICJ Advisory Opinion 2004), 101.

¹⁰¹ UN General Assembly, "International Covenant on Civil and Political Rights" (adopted Dec. 19, 1966, 999 U.N.T.S. 171, 1966), <http://www2.ohchr.org/english/law/ccpr.htm>.

¹⁰² UN General Assembly, "International Covenant on Economic, Social and Cultural Rights," December 16, 1966, United Nations, Treaty Series, vol. 993, p. 3.

¹⁰³ UN General Assembly, "International Convention on the Elimination of All Forms of Racial Discrimination," December 21, 1965, United Nations, Treaty Series, vol. 660, p. 195, <http://www2.ohchr.org/english/law/cerd.htm>.

convention on Elimination of All Forms of Discrimination against Women (CEDAW);¹⁰⁴ and the Convention on the Rights of the Child (CRC).¹⁰⁵ However, Israel does not recognize the applicability of relevant human rights treaties in the OPT based on the assumption that human rights law and international humanitarian law are mutually exclusive; and since parts of IHL apply in the “administered territories” then this means that human rights conventions that it signed do not apply.¹⁰⁶ This position has been expressed in several occasions. For example, in its second periodic report submitted to UN committee on Economic Social and Cultural Rights, Israel argued:

Israel has consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction. This position is based on the well-established distinction between human rights and humanitarian law under international law.¹⁰⁷

This position has been Israel’s consistent stance regarding all the areas that are beyond its sovereignty and in relation to all the human rights conventions. This position has been also rejected by the international community. The human rights committee, for example, refused Israel’s position, asserted that human rights and IHL are not mutually exclusive and declared:

... in current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by its authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of state responsibility of Israel under the principles of public international law.¹⁰⁸

The ICJ has sustained a similar opinion. In its advisory opinion on the legality of the threat or use of nuclear weapons in 1996, it held that the “protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the covenant whereby certain provisions may be derogated from in a time

¹⁰⁴ UN General Assembly, “Convention on the Elimination of All Forms of Discrimination Against Women,” December 18, 1979, United Nations, Treaty Series, vol. 1249, p. 13.

¹⁰⁵ UN General Assembly, “Convention on the Rights of the Child,” November 20, 1989, United Nations, Treaty Series, vol. 1577, p. 3.

¹⁰⁶ For a detailed analysis of Israel’s position on the applicability of human rights conventions in the OPT see, Orna Ben-Naftali and Yuval Shany, “Living in Denial: The Application of Human Rights in the Occupied Territories,” *Israel Law Review* 37 (2003): 17–118.

¹⁰⁷ State of Israel, “Implementation of the International Covenant on Economic, Social and Cultural Rights- Second Periodic Report,” August 3, 2001, UN Doc. E/1990/6/Add.32 (2001).

¹⁰⁸ Human Rights Committee, “Concluding Observations of the Human Rights Committee: Israel,” August 2003, para. 11, CCPR/CO/78/ISR.

of national emergency.”¹⁰⁹ Based on the same principles the court held in the Wall advisory opinion that the ICCPR, ICESCR and CRC, were all applicable to the occupied Palestinian territory.¹¹⁰ In its analysis, the ICJ found that in conflict zones and times, international human rights law can apply simultaneously with IHL. As a general rule, the court considered that “the protection offered by human rights convention does not cease in case of armed conflict.”¹¹¹

The 2005 Israeli “disengagement” from Gaza has not affected the applicability of IHL, for the mere reason that the Israeli effective control over the strip has not been given up fully yet.¹¹² Similarly, the UN General Assembly’s granting Palestine the status of observer state in the UN, has not changed anything on the ground and the Israeli effective control is still being exercised. It seems that the Assembly has pre-empted in the same resolution any misinterpretation to its decision in that regard, and stated that it reaffirmed “the applicability of the Geneva Convention..., to the Occupied Palestinian Territory, including East Jerusalem.”¹¹³

In conclusion, the Israeli position rejecting to implement the relevant human rights treaties has not accepted any recognition in the world. International customary law and treaty law are both applicable to the areas under which it exercises its sovereign jurisdiction as well as territories it occupies and runs under a military regime.

Against this background, Israel’s forced displacement of Palestinians whether in the areas on which it exercises sovereign authority as well as the territories it occupies will be examined according to the relevant customary and treaty legal principles that are relevant for each incident. This will be discussed in the following sections.

¹⁰⁹ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, 25 (ICJ 1996).

¹¹⁰ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 102–13 (ICJ Advisory Opinion 2004), para. 102–13.

¹¹¹ *Ibid.*, 106.

¹¹² Bashir and Mann, *Disengaged Occupiers*, 9; John Dugard, *Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967*, Report to the UN Commission on Human Rights in its Sixty Second Session (UN Commission on Human Rights, January 17, 2006), para. 6–11, U.N. Doc. E/CN.4/2006/29.

¹¹³ UN General Assembly, “Resolution 67/19,” 29 November 2012.

4.3 The legality of Israel's policy of Forced Displacements in International Law

The Israeli forced displacements as a result of the war and the measures that were analysed in Chapters 2 and 3 have violated international legal norms according to several bodies of international law. As will be explained in the following sections, first, forced displacement of civilians whether at times of war or peace is considered a war crime if it takes place in an occupied territory, and a crime against humanity if committed systematically.¹¹⁴ Secondly, Israel's status revocation policy, whether committed during or after wars, is illegal. When committed against the laws that prevented the Palestinians from acquiring an Israeli citizenship following the 1948 war amounted to de-nationalization according to the principles of the international law of state succession and the international law of nationality.¹¹⁵ Moreover, those who were deprived from the right to reside in the OPT following the war, and those whose Israeli regulated residency status was later revoked over the years, is a violation of an occupying power's duty to refrain from altering the law in force in an occupied territory, especially if such change affects the rights of the local population and violates additional norms of international law.¹¹⁶ Finally, Israel's policy of preventing Palestinians from return to their homes has violated international law in two additional ways: the first is that no other state is obliged to receive those refugees that Israel has produced because of its refrain from admitting them into their homes; and secondly, it has violated the well-established right of every person to enter his country, and by only implementing this violation on Palestinians, it also violated the principle of non-discrimination.¹¹⁷ The following three subsections will analyse Israel's mass forced displacements in its sovereign territory as well as the OPT, in the framework of international legal principles that are applicable to it.

¹¹⁴ See, Section 4.3.1 below.

¹¹⁵ See, Section 4.3.2.1 below.

¹¹⁶ See, Section 4.3.2.2 below.

¹¹⁷ See, Section 4.3.3 below.

4.3.1 The Development of the Crime of “Forced Displacement” in International Law

Since the beginning of the twentieth century, forced displacement of civilians has been developing to be condemned as an international crime. This development was influenced by a number of atrocities that took place during major wars which not only claimed the lives of millions of innocent civilians, but also forcibly removed millions from their homes, usually because of their ethnic or religious background. Mass displacements have taken place during the course of the First World War, Second World War, as well as many other international and domestic conflicts that took place during the last century; inflicting a great amount of suffering to the victims who were frequently dispossessed and turned into vulnerable refugees or internally displaced in need for protection and aid. These events happened at the same time of an active development of universal principles of human rights, international humanitarian law, and international criminal law, the progress of which aimed at guaranteeing basic rights of humans at times of war and peace.

The original prohibition of forced displacement or, “deportation and forcible transfer,” as a norm of customary international humanitarian law arguably stems from the Hague conventions of 1899 and 1907.¹¹⁸ In fact these conventions did not *explicitly* prohibit deportations or forcible transfers. It has been consistently reported that the reason behind the absence of such explicit prohibition was that there was a general understanding among the contracting states that at war time, “civilized nations no longer resorted to deportations,” as Henckaerts argues.¹¹⁹ This conclusion seems to have been put first into words at the time the commentary of the Fourth Geneva Convention was written. Jean Pictet, in his authoritative Commentary on the Fourth Geneva Convention, stated that the absence of reference to the question of deportation in the Hague Regulations was because “the practice of deporting persons was regarded at the

¹¹⁸ “Convention With Respect to Laws and Customs of War on Land” (Hague, July 29, 1899); “Hague Convention of 1907.”

¹¹⁹ Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (The Hague: Martinus Nijhoff Publishers, 1995), 151.

beginning of this century as having fallen into abeyance."¹²⁰ Alfred De Zayas explains this notion eloquently by writing:

Analogously, it would have seemed unnecessary to the delegates convened at The Hague in 1907 to draft special articles to prohibit cannibalism or human sacrifices. In this sense, the practice of expelling hundreds of thousands or even millions of civilians from their homes and deporting them hundreds of miles across the continent did not seem to belong to the Twentieth Century, and the thought of such expulsions would surely have evoked visions of the Assyrian and Roman campaigns to those delegates learned in ancient history.¹²¹

In the absence of an explicit prohibition of deportation in the laws of armed conflict, however, it has been repeatedly argued that Article 46, common to both conventions (1899 and 1907), provides prohibition against forcible displacement of civilian population. This article states that,

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.¹²²

This article, when understood with other principles of international law that require a state to ensure public order in occupied territory,¹²³ and the prohibition of collective punishment,¹²⁴ has been seen as a prohibition of arbitrary deportation of civilians.¹²⁵ Article 46 of Hague Convention was cited by the French assistant prosecutor during the Nuremberg Tribunal in 1945, as the main legal reference indicating the illegality of the Nazi deportations that took place during the Second World War.¹²⁶

In 1919, the Report of the Commission on the Responsibilities of the Authors of War and on the Enforcement of Penalties, drafted by representatives of the countries that ended up winning the First World War, condemned 'deportation of civilians' as a breach of

¹²⁰ Jean Pictet, ed., *Commentary of IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1958), 279–80.

¹²¹ Alfred M. de Zayas, "International Law and Mass Population Transfers," *Harvard International Law Journal* 16 (1975): 210.

¹²² "Hague Convention of 1899", Article 46; "Hague Convention of 1907", Article 46.

¹²³ "Hague Convention of 1907", Article 43.

¹²⁴ *Ibid.*, Article 50.

¹²⁵ Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd ed. (The Hague/London/ Boston: Kluwer Law International, 1999), 312; de Zayas, "International Law and Mass Population Transfers," 211–2.

¹²⁶ *2 Trial of the Major War Criminals Before the International Military Tribunal* (Nuremberg: IMT, 1947), 49.

the “laws and customs of war” and the “laws of humanity.”¹²⁷ It further recommended that these “crimes” be prosecuted and punished,¹²⁸ but this recommendation was never implemented.¹²⁹ It was noticeable in this conference that the United States and Japan dissented from the opinion that violations of the “laws of humanity” be prosecuted because it was not part of positive international law, but was according to them “not certain, varying with time, place and circumstances and according, it may be, to the conscience of the individual judge.”¹³⁰

In 1920, the victors of the First World War signed the Treaty of Sevres with the Ottoman State, which included among its provisions the repatriation of all “Turkish subjects of non-Turkish race who have been forcibly driven from their homes by fear of Massacre or any other form of pressure since January 1, 1914.”¹³¹ Moreover, the agreement required that Turkey would hand two kinds of suspects of crimes to be prosecuted in criminal tribunals: 1) those who committed “violations of laws and customs of war;”¹³² and 2) perpetrators of “massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914.”¹³³ The second element was related to the definition of ‘crimes against the laws of humanity’ as defined in the 1919 report mentioned above, and the term massacres here included deportations.¹³⁴ Nonetheless, these trials never took place because the Treaty of Sevres was not ratified, as Turkey waged its war of independence, and signed the more recent Lausanne treaty which gave an amnesty to all accused of crimes connected to the war.¹³⁵

¹²⁷ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, “Report Presented to the Preliminary Peace Conference,” *The American Journal of International Law* (1920) 14, no. 1/2 (March 29, 1919): 113–4.

¹²⁸ *Ibid.*, 116–24.

¹²⁹ M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, 2011), 329.

¹³⁰ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, “Report Presented to the Preliminary Peace Conference,” 114.

¹³¹ “Treaty of Peace Between the Allied Powers and Turkey (Treaty of Sevres),” August 10, 1920, reprinted in 15 *Am. J. Int’l L.*, (1921), pp. 179-181, <http://www.jstor.org/stable/2212728>, Article 144.

¹³² *Ibid.*, Article 226-9.

¹³³ *Ibid.*, Article 230.

¹³⁴ Bassiouni, *Crimes Against Humanity*, 383.

¹³⁵ “Lausanne Peace Treaty,” July 24, 1923, published at the Turkish Ministry of Foreign Affairs website, <http://www.mfa.gov.tr/lausanne-peace-treaty.en.mfa>, Annex VIII.

Moreover, the treaty endorsed “compulsory exchange of population” between Greece and Turkey effectively weakening the prohibition of forced displacement.¹³⁶

Nonetheless, the grant of Amnesty, as Bassiouni asserts, recognized the existence of the categories of “war crimes” and “crimes against the laws of humanity” as described in the 1919 report, but the prosecution and punishment of such crimes was waived.¹³⁷ It was not until the Second World War that 'deportation' was actually prosecuted as both a war crime and a crime against humanity.

Following the Second World War, the charter of the International Military Tribunal’s Trial of the Major War Criminals defined “war crimes” and “crimes against humanity” and condemned “deportation” as a crime in both categories.¹³⁸ The charter defined war crimes as “violations of the laws and customs of war,” and provided that such violations include “deportation to slave labour or for any other purpose of civilian population of or in occupied territory.”¹³⁹ Similarly, crimes against humanity were defined as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹⁴⁰

These two categories of crime, namely, war crimes and crimes against humanity, came to cover the whole range of crimes perpetrated by Nazi Germany during the war, including the ones targeting German civilians.¹⁴¹ While the concept of “war crimes”, i.e. violations of the laws and customs of the laws of war, had been long recognized by the international community, the addition of “crimes against humanity” which was mainly

¹³⁶ “Lausanne Peace Treaty VI. Convention Concerning the Exchange of Greek and Turkish Populations Signed at Lausanne,” January 30, 1923, published at the Turkish Ministry of Foreign Affairs website, http://www.mfa.gov.tr/lausanne-peace-treaty-vi_-convention-concerning-the-exchange-of-greek-and-turkish-populations-signed-at-lausanne_.en.mfa.

¹³⁷ Bassiouni, *Crimes Against Humanity*, 94–5.

¹³⁸ United Nations, “Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis” (London, August 8, 1945).

¹³⁹ *Ibid.*, Article 6(b).

¹⁴⁰ *Ibid.*, Article 6(c).

¹⁴¹ Ilias Bantekas and Susan Nash, *International Criminal Law*, 2nd ed. (Cavendish Publishing, 2003), 330–1.

designed to prosecute a state's crimes committed in its own territory had been less recognized as an existing legal norm then.¹⁴² Indeed, the latter category of crimes is derived from the concept of "breaches of the laws of humanity" advanced first by the preamble of the 1899 and 1907 Hague regulations, and later the 1919 Paris conference recommendations mentioned above.¹⁴³ This time, it was introduced into positive international law,¹⁴⁴ finally allowing states to punish perpetrators of atrocities against their own civilians, confirming the principle, as David Luban explains it that when mass atrocities happen, "criminality overrides state sovereignty, turning them into international crimes."¹⁴⁵

Pierre Mounier, assistant prosecutor for the French Republic, in opening remarks in the International Military Tribunal on 20 November 1945, argued that deportation had been contrary to international law. He stated:

These deportations were contrary to the international conventions, in particular to Article 46 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and to Article 6(b) of the Charter.¹⁴⁶

During the trials, several Nazi leaders were prosecuted for deportations of the civilians in occupied territories, as well as territories annexed to Germany. For example, it was argued on 26 February, 1946 that Germany de-populated several occupied territories, within a policy called "Germanization," and replaced the deported populations with German nationals.¹⁴⁷ The prosecutor pleaded:

¹⁴² Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Springer, 2008), 73; Norbert Ehrenfreund, *The Nuremberg Legacy: How the Nazi War Crimes Trials Changed the Course of History* (Palgrave Macmillan, 2007), 121; Ilias Bantekas, *International Criminal Law*, 4th ed. (Oxford ;: Hart Pub, 2010), 185–7.

¹⁴³ Damgaard, *Individual Criminal Responsibility for Core International Crimes*, 72–3.

¹⁴⁴ Bassiouni, *Crimes Against Humanity*, 136–7.

¹⁴⁵ David Luban, "A Theory of Crimes Against Humanity," *Yale Journal of International Law* 29 (2004): 95.

¹⁴⁶ 2 *Trial of the Major War Criminals Before the International Military Tribunal*, 49.

¹⁴⁷ 8 *Trial of the Major War Criminals Before the International Military Tribunal* (Nuremberg: IMT, 1947), 265.

Locality after locality, village after village, hamlets and cities in the incorporated territories were cleared of the Polish inhabitants. This began in October 1939, when the locality of Orlov was cleared of all Poles who lived and worked there.¹⁴⁸

The Germanization policy was clearly condemned in the indictments of the trials, also in areas that were annexed to Germany. It was seen that the policy of changing the demographic nature of certain territories from non-German to German was a serious war crime or crime against humanity. Count 3, section B of the Nuremberg indictment focused on deportations in occupied territory, as mentioned in the charter. Count 3, section J of the indictment stated:

In certain occupied territories purportedly annexed to Germany the defendants methodically and pursuant to plan endeavoured to assimilate these territories politically, culturally, socially, and economically into the German Reich. They endeavoured to obliterate the former national character of these territories. In pursuance of these plans, the defendants forcibly deported inhabitants who were predominantly non-German and replaced them by thousands of German colonists.¹⁴⁹

Hence, the Nuremberg tribunal condemned deportation as an attempt to change the demographic structure of occupied territories in order to assimilate them.

Following the trials, the UN General Assembly issued a resolution affirming “the principles of international law recognized by the Charter of the Nurnberg Tribunal and the judgment of the tribunal.”¹⁵⁰ By this resolution, the UN General Assembly reflected that the international community as a whole accepts the principles of the Nuremberg tribunals, an action that reflects that these principles became customary. This conclusion was reached by the European Court of Human Rights which noted that “the universal validity of the principles concerning crimes against humanity was subsequently confirmed by, inter alia, resolution 95 of the United Nations General Assembly.”¹⁵¹ Similarly, Antonio Cassese reached this conclusion as he argued:

Translated into law making terms, this approval and support meant that the world community had robustly set in motion the process for turning the principles at

¹⁴⁸ Ibid.

¹⁴⁹ 2 *Trial of the Major War Criminals Before the International Military Tribunal*, 57.

¹⁵⁰ UN General Assembly, “Resolution 95(I),” December 11, 1946.

¹⁵¹ Kolik and Kislyiy vs. Estonia, nos. 23052/04 and 24018/04, 9 (European Court of Human Rights 2006).

issue into general principles of customary law binding on member states of the whole international community.¹⁵²

Then, in 1947 the UN General Assembly created the International Law Commission (hereinafter ILC) with the purpose of promoting “the progressive development of international law and its codification,”¹⁵³ and instructed it to “formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.”¹⁵⁴ In its report, the ILC recognized that deportation was both a crime against humanity and a war crime.¹⁵⁵ In its analysis, it considered that crimes against humanity can be committed regardless of connection to a war, thus recognized that such crimes can be committed at times of peace.¹⁵⁶ The report states that

In its definition of crimes against humanity, the Commission has omitted the phrase “before or during the war” contained in article 6(c) of the Charter of the Nurnberg Tribunal because this phrase referred to a particular war, the war of 1939. The omission of the phrase does not mean that the Commission considers that crimes against humanity can be committed only during a war. On the contrary, the Commission is of the opinion that such crimes may take place also before a war in connexion with crimes against peace.¹⁵⁷

As time went by, the prohibition, and indeed the prosecution, of deportation in both sovereign and occupied territory became stronger. In 1949, the Fourth Geneva Convention was signed, codifying more rules and customs of war. It stated in article 49 that:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.¹⁵⁸

In the following paragraph it stated that the only exceptions for this prohibition are the security of the “population itself or imperative military reasons.”¹⁵⁹ Nevertheless, the

¹⁵² Antonio Cassese, “Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, General Assembly Resolution 95(I),” *United Nations Audiovisual Library of International Law*, accessed January 4, 2013, http://untreaty.un.org/cod/avl/ha/ga_95-I/ga_95-I.html.

¹⁵³ UN General Assembly, “Resolution 174(II),” November 21, 1947.

¹⁵⁴ UN General Assembly, “Resolution 177(II),” November 21, 1947.

¹⁵⁵ *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, Yearbook of the International Law Commission, 1950, para. 118–124, UN Doc. No. A/316 (A/5/12).

¹⁵⁶ *Ibid.*, para. 121–4.

¹⁵⁷ *Ibid.*, 124.

¹⁵⁸ “Convention (IV) Relative to the Protection of Civilian Persons in the Times of War”, Art 49.

occupying power should not expel the population outside the occupied territory, and has to allow the return of those transferred as soon as the hostilities stop.¹⁶⁰ Henckaerts asserted that the prohibition of mass deportations and population transfers contained in Article 49(1) is “undoubtedly declaratory of customary international law;”¹⁶¹ as it has been argued above. Similarly, Alfred De Zayas argues that the articles of the Geneva Convention “merely codify the prohibition of deportations of civilians from occupied territories which in fact already existed in the laws and customs of war.”¹⁶²

Article 147 of the convention further enlists deportation as a “grave breach” that requires prosecution and punishment.¹⁶³ Jean Pictet explained this in the authoritative commentary of the GCIV writing that:

[t]he prohibition is absolute and allows of no exceptions, apart from those stipulated in paragraph 2 [of article 49]...“unlawful deportation or transfer” was introduced among the grave breaches, defined in article 147 of the convention as calling for the most severe penal sanctions.¹⁶⁴

In 1991, the International Law Commission drafted a “draft Code of Offences against the Peace and Security of Mankind” in which it included “deportation or transfer of the civilian population” among exceptionally serious violations of principles and rules of International law applicable in armed conflict.”¹⁶⁵

In the development of prosecutions of crimes against humanity and war crimes after this date, states and international tribunals have been consistent in condemning deportations and population transfers as punishable crime. The statute of the International Criminal Tribunal for the Former Yugoslavia (Hereinafter, ICTY) condemned forcible transfer and deportation as a grave breach of the Geneva Conventions and only

¹⁵⁹ Ibid., Art 49.

¹⁶⁰ Ibid.

¹⁶¹ Henckaerts, *Mass Expulsion in Modern International Law and Practice*, 153.

¹⁶² de Zayas, “International Law and Mass Population Transfers,” 210.

¹⁶³ “Convention (IV) Relative to the Protection of Civilian Persons in the Times of War” Articles 146-7.

¹⁶⁴ Pictet, *Fourth Geneva Convention Commentary*, 279–80.

¹⁶⁵ International Law Commission, *Report of the Commission to the General Assembly on the Work of Its Forty-third Session*, Yearbook of the International Law Commission (Geneva and New York, 1991), vol. 2, part II, para. 176, Article 21, UN Doc. A/CN.4/SER.A/1991/Add.I (Part 2).

deportation as a crime against humanity.¹⁶⁶ Because the statute of the tribunal did not enlist forcible transfer as a crime against humanity, the tribunal's jurisprudence has also convicted forcible transfers as “other inhuman acts” punishable as crimes against humanity.¹⁶⁷ In *Prosecutor v. Stakic* case (2006) the Appeal Chamber judgment stated:

The protected interests underlying the prohibition against deportation include the right of the victim to stay in his or her home and community and the right not to be deprived of his or her property by being forcibly displaced to another location. The same protected interests underlie the criminalization of acts of forcible transfer, an “other inhuman act” pursuant to Article 5(i) of the statute.¹⁶⁸

What can be concluded from this judgment is that the ICTY has not only condemned deportations across national borders as a crime, but it has also found the transfer of civilians within the national borders of a country equally criminal. As clarified by the judgment quoted above, the interest that international law is protecting by criminalizing deportation is the same as the one it is protecting by condemning forcible transfer. It reflects the right of every person to reside in his/her home and be protected from forced displacement. When the ICTY found that there is no explicit statutory condemnation of forcible transfer as a crime, it included this crime under “other inhuman acts” so that the criminals would not be exempted from accountability for such squarely criminal act.

The ICTY has been consistent in condemning forcible transfer as “other inhuman acts.” In the more recent case of *Prosecutor v. Dordevic* (2011), the Trial Chamber judgment stated:

In the present case the acts of forcible transfer have been charged as “other inhuman acts” under article 5(i) of the statute. The Chamber is satisfied that the acts of forcible transfer established in the present case... are of a similar seriousness to other enumerated crimes against humanity. The acts of forcible transfer were of similar gravity as the acts of deportation. They involved a forced

¹⁶⁶ UN Security Council, “Statute of the International Tribunal for the Prosecution of the Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991” (UN Doc S/25704 at 23, Annex (1993) and S/25704/Add.1, Adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827, 1993) Article 2(g) & 5(d).

¹⁶⁷ *Ibid.* Article 5(i).

¹⁶⁸ *Prosecutor v. Milomir Stakic Appeals Judgment*, 277 (ICTY 2006).

departure from the people's homes and communities, often gave physical and emotional disruption and uncertain prospects for their return.¹⁶⁹

Hence, the ICTY has equally condemned deportation and population transfers as a crime.

The International Criminal Tribunal for Rwanda (hereinafter ICTR) and the Special Court of Sierra Leone (SCSL) also enlisted deportation as a crime against humanity.¹⁷⁰ The Rome Statute of the International Criminal Court also extended its jurisdiction over both deportations and forcible transfer of populations, and defines them as part of both crimes against humanity and war crimes.¹⁷¹

The International Committee of the Red Cross (ICRC) issued a study in 2005 that aimed at codifying the customary international humanitarian law norms. It found that the prohibition of deportations and population transfers was a customary international legal norm applicable to both international and non-international armed conflicts. The study states:

A. Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand.

B. Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.¹⁷²

In conclusion, it seems fair to conclude that the illegality of deportations and forcible transfers in international criminal law has gained momentum from the beginning of the twentieth century until now, and is part of customary international law.¹⁷³ It got to

¹⁶⁹ Prosecutor v. Vlastimir Dordevic Trial Judgment, 1703 (ICTY 2011).

¹⁷⁰ UN Security Council, "Statute of the International Tribunal for Rwanda" (Adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600, 1994) Article 3(d); UN Security Council, "Statute of the Special Court for Sierra Leone" (Adopted by S.C. Res. 1315, 2000) Article 2(d).

¹⁷¹ UN General Assembly, "Rome Statute of the International Criminal Court (last Amended 2010)" (ISBN No. 92-9227-227-6, July 17, 1998) Articles 7(1)(d) and 8 (vii) .

¹⁷² Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume 1, Rules* (Cambridge University Press, 2005), 457.

¹⁷³ This conclusion has been shared by several authors. See for example, Federico Andreu-Guzman, "Criminal Justice and Forced Displacement: International and National Perspectives," in *Transitional Justice and Displacement*, ed. Roger Duthie, *Advancing Transitional Justice* 5 (Social Science Research Council,

be considered and officially declared as a customary rule in international law in the aftermath of the Second World War, but then gained further acceptance as a war crime and a crime against humanity with the passage of time between then and the current time. Every international judicial institution since Nuremburg has incorporated the crime of “deportation or forcible transfer” into its statute. There is no doubt, thus, that international law has not tolerant, since the Second World War, of forced displacement of civilian population.

4.3.1.1 Elements of the Crime of Forced Displacement

The general elements of deportation or forcible population transfer have undergone great development, especially in the jurisprudence of the ICTY. As noted by a number of authors, the jurisprudence of the ICTY was the major venue through which the crime of forced displacement was developed, as a result of the fact that ethnic cleansing was one of the main crimes committed in the Yugoslavian conflict.¹⁷⁴ This tribunal, basing itself on the norms of customary international law has defined the elements of deportation as:

- there is a forcible displacement of individuals;
- those individuals are lawfully present in the area from which they are displaced;
- there is an absence of grounds under international law permitting the displacement;
- the forcible displacement must be across boundaries; and
- the forcible displacement must be carried out intentionally.¹⁷⁵

Forcible population transfer shares nearly identical elements with deportation, the only difference being element 4. When the population is forcibly displaced within the borders of the state or territory, the crime would be defined as transfer of population.¹⁷⁶

2012), 235; See also, Guido Acquaviva, *Forced Displacement and International Crimes*, Legal and Protection Policy Research Series (Geneva: UNHCR, June 2011), <http://www.unhcr.org/4e0344b344.pdf>.

¹⁷⁴ Bassiouni, *Crimes Against Humanity*, 392–4; Andreu-Guzman, “Criminal Justice and Forced Displacement: International and National Perspectives,” 237; Joanna Korner, *Criminal Justice and Forced Displacement in the Former Yugoslavia*, Case Studies on Transitional Justice and Displacement (ICTJ and Brookings-LSE Project on Internal Displacement, July 2012), 6.

¹⁷⁵ Prosecutor v. Vlastimir Dordevic Trial Judgment, 1604 (ICTY 2011), para. 1604; Prosecutor v. Milomir Stakic Appeals Judgment, 278–9, 282 (ICTY 2006), para. 278–9, 282; Prosecutor v. Momcilo Krajisnik (Appeal Judgment), 304, 726 (ICTY 2009); Prosecutor v. Milan Martić Trial Judgment, 111 (ICTY 2007).

On the meaning of the term “forcible displacement,” the jurisprudence of ICTY has provided that it means:

...carried out by expulsion or other forms of coercion such that the displacement is involuntary in nature, and the relevant persons had no genuine choice in their displacement.¹⁷⁷

The court added that “it is the absence of genuine choice that makes the displacement unlawful.”¹⁷⁸ It also clarified that the displacement would be forceful even if other methods were used, including “fear of violence, duress, detention, psychological oppression or abuse of power or taking advantage of a coercive environment.”¹⁷⁹

As for the third element, the ICTY has determined that the grounds that permit displacement in international law are the same as the ones set by the Fourth Geneva Convention, namely, the security of the civilians or imperative military reasons; as long as the displaced persons are “transferred back... as soon as the hostilities in that area have ceased.”¹⁸⁰

Deportation or forcible transfer is considered a war crime when conducted in an occupied territory or with nexus to an armed conflict and a crime against humanity when the object of this crime is any civilian population including the jurisdiction of a state's sovereign areas and its own citizens.¹⁸¹ Hence, a crime against humanity can also be committed in an occupied territory because such crime can be committed on any civilian population. War crimes and crimes against humanity are not mutually exclusive, and can be prosecuted simultaneously.¹⁸² Practically, if an occupying power forcibly displaces one

¹⁷⁶ Prosecutor v. Vlastimir Dordevic Trial Judgment, 1613 (ICTY 2011), para. 1613; Prosecutor v. Milomir Stakic Appeals Judgment, 317 (ICTY 2006), para. 317; Prosecutor v. Milan Martić Trial Judgment, 111 (ICTY 2007), para. 111; ICTY, Prosecutor v. Blagojevic and Jokic (Trial Judgment), 595 (ICTY 2005); ICTY, Prosecutor v. Milorad Krnojelac (Trial Judgement), 474, 476 (ICTY 2002); Bassiouni, *Crimes Against Humanity in International Criminal Law*, 312; William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, 2006), 203; Ilias Bantekas, *International Criminal Law*, 152; Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2010), 267.

¹⁷⁷ Prosecutor v. Vlastimir Dordevic Trial Judgment, 1605 (ICTY 2011), para. 1605.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid., para. 1607; Prosecutor v. Milomir Stakic Appeals Judgment, 284 (ICTY 2006), 284; Prosecutor v. Milan Multinovic Trial Judgment, 1, para. 166 (ICTY 2009).

¹⁸¹ Bassiouni, *Crimes Against Humanity in International Criminal Law*, 315.

¹⁸² Acquaviva, *Forced Displacement and International Crimes*, 19.

individual or a number of individuals without having a systematic policy or a widespread implementation, then these displacements are war crimes. However, if these displacements are widespread or systematic, they amount to both war crimes and crimes against humanity.

The elements of deportation or forcible transfer differ also in the case of it being a war crime or a crime against humanity. In the case of war crime, first, a single deportation is condemned as a war crime as was expressed explicitly by Article 49 of GCIV when it stated that “individual or mass forcible transfers, as well as deportation” are prohibited.¹⁸³ The scale of the forcible displacement does not change it being condemned as such. Secondly, the destination of the displacement does not affect its condemnation as a crime. Article 49 of GCIV stated that deportation or transfer “to the territory of the Occupying Power or to that of any other country, occupied or not” is prohibited.¹⁸⁴ The ICC statute has stipulated in Article 8(2)(b)(viii) that “deportation or transfer of all or parts of the population of the occupied territory *within or outside this territory*”[emphasis added] is a war crime.¹⁸⁵ Thirdly, only forcible displacements are war crimes, as explained above. This was confirmed by Jean Pictet’s commentary on the GCIV, noting that this issue was discussed in the conference, and that contracting states expressed that they only want forcible displacements to be considered illegal.¹⁸⁶ A voluntary departure is, therefore, not a war crime. What distinguishes voluntary from forced displacement is the lack of “genuine choice” as held by the ICTY as shown above.¹⁸⁷

The elements of forcible displacement as a crime against humanity are similar with one major exception: the scope. Forcible displacement of a civilian population needs to be either widespread, or part of a systematic policy, in order to be considered a crime against

¹⁸³ “Convention (IV) Relative to the Protection of Civilian Persons in the Times of War” Article 49(1); Henchaerts explains that the criminalization of a single forced displacement is unique to occupied territory. This corresponds with the requirement of a widespread or systematic attack for condemnation as a crime against humanity. Henckaerts, *Mass Expulsion in Modern International Law and Practice*, 144.

¹⁸⁴ “Convention (IV) Relative to the Protection of Civilian Persons in the Times of War”, Article 49(1).

¹⁸⁵ UN General Assembly, “Rome Statute of the International Criminal Court” Article 8(2)(b)(viii).

¹⁸⁶ Pictet, *Fourth Geneva Convention Commentary*, 279.

¹⁸⁷ Prosecutor v. Vlastimir Dordevic Trial Judgment, 1605 (ICTY 2011), para. 1605.

humanity.¹⁸⁸ This corresponds more with its contemporary application,¹⁸⁹ especially because the IMT charter did not include such condition.¹⁹⁰ A violation of human rights is regarded “widespread” when it is committed against a large number of people, and systematic when regarded as part of a policy designed to inflict such violation.¹⁹¹ In its “Draft Codes of Crimes against the Peace and Security of Mankind,” the ILC defined a crime against humanity as committing a list of defined acts (including deportation or forcible transfer of population) “when committed in a systematic manner or on a large scale and instigated or directed by a government or by any organization or group.”¹⁹² In its commentary, it explained these notions by stating that the terms “in a systematic manner or on a large scale” mean one of two alternatives:

The first alternative requires that the inhumane acts be committed “in a systematic manner” meaning pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhuman acts. The thrust for this requirement is to exclude random act which was not committed as part of a broader plan or policy...

The second alternative requires that the inhumane acts be committed “on a large scale” meaning that the acts are directed against multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim...¹⁹³

Hence, as the ILC explained, a crime against humanity cannot be regarded as such if it was only an isolated act. However, if a state or an organization is systematically designing policies to persecute a civilian population, then this amounts to a crime against

¹⁸⁸ Damgaard, *Individual Criminal Responsibility for Core International Crimes*, 79–81; Steven Richard Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd ed. (Oxford: Oxford University Press, 2001), 58–61; Bassiouni, *Crimes Against Humanity*, 395.

¹⁸⁹ The Rome Statute provides that crimes against humanity are a number of enlisted acts (including deportation and population transfer) when committed “as part of a widespread or systematic attack directed against any civilian population.” UN General Assembly, “Rome Statute of the International Criminal Court” Article 7(1).

¹⁹⁰ The charter that ruled the IMT named the crimes including deportation, and decided its jurisdiction to include such crimes when conducted “before or during the war.” No condition of scope was mentioned. United Nations, “London Charter.”

¹⁹¹ Damgaard, *Individual Criminal Responsibility for Core International Crimes*, 79–80.

¹⁹² International Law Commission, *Report of the International Law Commission on the Work of Its Forty-eighth Session*, Yearbook of the International Law Commission (Geneva and New York: ILC, 1996), 47, U.N. Doc. A/CN.4/SER.A/1996/Add.I (Part 2).

¹⁹³ *Ibid.*, 47.

humanity. Furthermore, if the number of victims is large, even in the absence of a policy, any act contributing to the persecution would be regarded a crime against humanity. In the *Tadec* case, the ICTY further decided that a single violation that forms part of a bigger systematic or widespread attack is also a crime against humanity.¹⁹⁴

At the time of the IMT, a major criterion was the nexus of the crimes against humanity to the war.¹⁹⁵ The report of the ILC clarified, as shown earlier, that this limitation is merely jurisdictional, and does not mean that a crime against humanity takes place only at the time of war or armed conflict.¹⁹⁶ Similarly, in its development as discussed above, this nexus was not required as an element, although in some cases like the ICTY the statute of the tribunal limited its jurisdiction over crimes that took place during the armed conflict that it targeted.¹⁹⁷ Still, crimes against humanity can be conducted at times of war or peace as recognized by the Trial Chamber of the ICTY itself in *Tadic* case, noting that “customary international law no longer requires any nexus between crimes against humanity and armed conflict;”¹⁹⁸ and that the inclusion of this condition in ICTY and IMT charters is jurisdictional.¹⁹⁹ Indeed, this is a fair interpretation in the context of international criminal law. It is inconceivable why a state’s systematic crimes against a civilian population during peace times would not be condemned as such unless linked to an armed conflict. The IMT and the ICTY were *ad hoc* tribunals that were linked to specific conflicts, and the authors of the statutes of these two tribunals wanted to limit the

¹⁹⁴ Prosecutor v. Dusko Tadic (Trial Judgement), IT-94-1-T, 649 (ICTY 1997).

¹⁹⁵ United Nations, “London Charter”; Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 51; Damgaard, *Individual Criminal Responsibility for Core International Crimes*, 77–9.

¹⁹⁶ *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, 124.

¹⁹⁷ ICTY statute provides in Article 5 that “International Tribunal has the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or national in character, and directed against any civilian population.” (Emphasis added) UN Security Council, “Statute of the International Tribunal for the Prosecution of the Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991.”

¹⁹⁸ Prosecutor v. Dusko Tadic (Trial Judgement), IT-94-1-T, 627 (ICTY 1997), para. 627.

¹⁹⁹ *Ibid.* The judgment explained that despite the inclusion of the requirement of nexus to an armed conflict in the Nuremberg Tribunal jurisdiction the inclusion of this requirement “deviates from the development of the doctrine after the Nuremberg Charter, beginning with Control Council Law No. 10, which no longer links the concept of crimes against humanity with an armed conflict.”

jurisdiction of their work. Nonetheless, these jurisdictional clauses have no implication on the condemnation of the crimes at times of war and peace alike.

Another element in controversy is that of discrimination. Prosecution on discriminatory grounds was part of the jurisdiction of the London Charter,²⁰⁰ and similarly, the ICTR Statute also included discrimination as an element to the tribunal's jurisdiction over the cases.²⁰¹ The ICC, on the other hand, as well as the other international tribunals did not require discrimination as an element.²⁰²

A final element in question is whether the act needs to be part of a policy of a state or organization. Article 6 of the London Charter gave the IMT the jurisdiction to try all perpetrators of international crimes "acting in the interests of the European Axis countries, whether as individuals or as members of organizations."²⁰³ The ICC statute follow these steps,²⁰⁴ while ICTY and ICTR do not have any reference to state or organizational involvement as an element of crimes against humanity. The ILC included

²⁰⁰ United Nations, "London Charter," The London Charter in Article 6(c) included the text "... or persecution on political, racial, or religious ground in extension of or in connection with any crime within the jurisdiction of the Tribunal..." ; Bassiouni asserts that discrimination was an element of the crime against humanity at the IMT, in addition to the nexus to war. Bassiouni, *Crimes Against Humanity*, 21.

²⁰¹ ICTR Statute states in article 3 that the tribunal has jurisdiction on crimes "when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds." UN Security Council, "Statute of the International Tribunal for Rwanda"; A. Danner, "Constructing a Hierarchy of Crimes in International Criminal Law Sentencing," *Virginia Law Review* 87, no. 3 (2001): 459–60.

²⁰² The Rome Statute of the ICC defined a crime against humanity to include a listed number of acts when "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." There was no reference to an element of discrimination similar to that in the ICTR. See, UN General Assembly, "Rome Statute of the International Criminal Court," Article 7; Similarly, the ICTY statute defined crimes against humanity as a listed number of acts when "committed in armed conflict, whether international or internal in character, and directed against any civilian population." There is no reference to the element of discrimination. UN Security Council, "Statute of the International Tribunal for the Prosecution of the Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991," Article 5; The statute of the Special Court for Sierra Leone also stipulated that a crime against humanity is committed "as part of a widespread or systematic attack against any civilian population," without reference to discrimination. See, UN Security Council, "Statute of the Special Court for Sierra Leone," Article 2.

²⁰³ United Nations, "London Charter" Article 6.

²⁰⁴ Article 7(2)(a) of The Rome Statute defines the term "attack directed against any civilian population" as "a course of conduct ... pursuant to or in furtherance of a state or organizational policy to commit such attack" UN General Assembly, "Rome Statute of the International Criminal Court."

this element in its definition of crimes against humanity.²⁰⁵ According to Bassiouni, this element is a necessary one to define crimes against humanity because “by virtue of their nature, and scale require the use of governmental institutions, structures, resources, and personnel acting in reliance upon arbitrary power uncontrolled by the law.”²⁰⁶

4.3.1.2 Application to the Israeli Displacements

As explained in Chapters 2 and 3, Israel has forcibly displaced the majority of the Palestinian population between 1948 and the current day by using several methods.²⁰⁷ First, in its war operations in both its 1948 and 1967 wars it designed military operations that specifically aimed at cleansing whole communities from their towns and villages.²⁰⁸ Most of those displaced were pushed outside the *de facto* lines of each of the wars, while some managed to stay in but turned into internally displaced. Both exoduses were widespread. As established above, the term “widespread” as an element of a crime against humanity refers to a large number of people.²⁰⁹ Israel’s forced displacements included 80% of the non-Jewish population in the territory on which Israeli claimed its sovereignty after the 1948 war;²¹⁰ and more than one third of the population of the West Bank and Gaza in 1967.²¹¹ It cannot be argued that these incidents were isolated individual incidents in light of the displacement of such a large portion of the whole Palestinian population. In addition, many of the displacements were “systematic,” or in other words “pursuant to a preconceived plan or policy.”²¹² As explained in Chapter 2, the displacements were designed in the official war plan of 1948, and were done according to

²⁰⁵ International Law Commission, *Report of the International Law Commission on the Work of Its Forty-eighth Session*, vol. 2, part 2, para. 50, Article 18, commentary no. (5).

²⁰⁶ Bassiouni, *Crimes Against Humanity in International Criminal Law*, 249.

²⁰⁷ Badil estimates that as much as 66 percent of the whole Palestinian population has been displaced at least once. Some of this total number has been displaced twice or multiple times. Badil, Resource Center for Palestinian Residency and Refugee Rights, *Survey of Palestinian Refugees and Internally Displaced Persons 2010-2012* (Beithlehem: BADIL, 2012), xvii.

²⁰⁸ See, Chapter 2, sec. 2.2 above.

²⁰⁹ See sec. 4.3.1.1 above.

²¹⁰ Nur Masalha, *Expulsion of the Palestinians: The Concept of “Transfer” in Zionist Political Thought 1882-1948* (Washington: Institute for Palestine Studies, 1992), 175.

²¹¹ Badil, Resource Center for Palestinian Residency and Refugee Rights, *Survey of Palestinian Refugees and Internally Displaced Persons 2010-2012*, xxvi.

²¹² See sec. 4.3.1.1 above.

clear orders in 1967. Hence, these mass displacements were intentional. Furthermore, when the hostilities ended, Israel did not allow the displaced persons to return to their homes, by virtue of physical and regulatory barriers, as explained in Chapter 2. The prevention of infiltration laws and military orders, as well as the deprivation from the right to reside in Israel and the OPT reflect an intention to make the displacement of the victims durable. There is no basis to argue that the civilian population living in their homes was living therein illegally and such argument has never been made. Both mass displacements took place in the context of an armed conflict. Hence, it is safe to conclude that the forced displacements of both wars amounted to war crimes and crimes against humanity.

As for the continuous displacements analysed in Chapter 3, they were a direct result of a long process of regulatory engineering that resulted in the displacement of hundreds of thousands of Palestinians by the operation of the regime's legal system. In these deportations and transfers, the mere fact that the Israeli civil and military legal systems have been designed to inflict the displacements reveals the systematic nature of the displacements. In addition, those displacements that are taking place in the occupied territory are war crimes as well because of them being "grave breaches" of the Geneva Convention. Let us examine one case study of a displacement that took place as a result of regulatory engineering to make the current argument more concrete.

In Chapter 3, it was explained that Israel developed a policy of revoking the residency of Jerusalemites whose "centre of life" ceased to be within the borders that Israel defined as part of sovereign territory.²¹³ One of the victims of this policy was Dr. Mubarak Awad, a Palestinian Jerusalemite who studied in the United States and later acquired its citizenship.²¹⁴ In one of his visits to his home in Jerusalem, he discovered that his residency had been revoked by the Israeli Ministry of Interior for the sole reason that he had acquired an American citizenship and moved his centre of life therein.²¹⁵ This revocation of residency was based on the Entry into Israel Regulations, which stipulated

²¹³ See, Chapter 3, sec. 3.3 above

²¹⁴ HCJ, 282/88 - 'Awad v Yitzhak Shamir, Prime Minister and Minister of Interior et al. Judgment, 1 (HCJ 1988), para. 1.

²¹⁵ Ibid., para. 2.

that a permanent residency would be lost by its bearer if he leaves Israel for a period of 7 years; receives a permanent residency permit in another country; or receives citizenship of that country through naturalization.²¹⁶ When Awad petitioned the Israeli Supreme Court, it rejected his petition based on the fact that he “uprooted himself from the country and rooted himself in the USA,” blaming him for his own plight.²¹⁷ As explained earlier, Israel had illegally annexed East Jerusalem, and applied its own laws therein granting its residents an easily revocable residency status.

The revocation of Awad’s right to reside in Jerusalem amounts to a war crime and crime against humanity. First, his displacement is forced. Obviously, his petition to Israeli Supreme Court to regain his right to reside in Jerusalem is a clear expression that no genuine choice was expressed by him in wanting to leave Jerusalem permanently. Secondly, as a protected person in an occupied territory according to the GCIV, he is lawfully present in his hometown Jerusalem. The “illegality” of his presence is only a result of an Israeli discriminatory legal system which would not have applied to him had he been Jewish or had Israel recognized and respected the applicability of the GCIV in the OPT. Furthermore, the Israeli law according to which his residency was revoked is contrary to international humanitarian law as it forbids an occupying power from changing the laws in the occupied territory, even in the case of an illegal annexation, in a way that would harm the civilian population.²¹⁸ Thirdly, there is no ground in international law permitting his displacement. His deportation was not linked to any military considerations and was not to protect him from any hostilities. Fourth, he was deported across the boundaries of the OPT. Fifth, the forced displacement has been carried out intentionally by an act of the Ministry of Interior that was supported by the Supreme Court.

Since East Jerusalem is an occupied territory as explained earlier, the deportation of Awad is a war crime. Moreover, it amounts to a crime against humanity because it is

²¹⁶ Israeli Minister of the Interior, *Entry into Israel Regulations (1974)*, 1974, Regulation 11a. An unofficial translation to English is provided by Hamoked, available at: <http://www.hamoked.org/files/2010/regulation%2011a.pdf>.

²¹⁷ HCJ, 282/88 - ‘Awad v Yitzhak Shamir, Prime Minister and Minister of Interior et al. Judgment, 15 (HCJ 1988), para. 15.

²¹⁸ See, sec. 4.3.2.2 below.

part of a systematic and widespread policy of residency revocations in the OPT, as explained in Chapter 3. In *Tadic* case, the ICTY judged that “clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable.”²¹⁹ Awad’s deportation is not a single isolated violation of his right, but rather part of a policy that is stipulated by the Israeli legal regime affecting hundreds of thousands of victims. Hence, the deportation of Awad amounts to a war crime and a crime against humanity.

Awad’s case is representative of many others who were referred to in Chapter 3. Each one of the deportations and transfers resulting from the Israeli discriminatory policies is a crime.

Finally, it is important to stress that victims rarely find remedies in the Israeli Supreme Court due to the low standards of human rights that the court refers to. As explained earlier, Israel does not recognize the applicability of international human rights law and the GCIV in the OPT. More specifically, Article 49 of the GCIV has been rejected explicitly by the court. In a deportation case known as the *Kawasme* (also spelled as Qawasmi) case, the court stated:

All of Article 49, and the Fourth Geneva Convention in general, does not form part of customary international law, and therefore the deportation orders do not contravene the domestic law of the state of Israel or of the Judea and Samaria Region, according to which an Israeli court reaches its decisions.²²⁰

The court was consistent in its refusal to apply article 49 of the Fourth Geneva Convention, and there were instances when it was annoyed by lawyers' continuous request to apply it. The Israeli attorney, Felicia Langer, who advocated several deportation cases, once withdrew a case protesting this position. She wrote explaining that:

²¹⁹ Prosecutor v. Dusko Tadic (Trial Judgement), IT-94-1-T, 649 (ICTY 1997), 649.

²²⁰ HCJ 698/80, *Kawasme et al v. The Minister of Defence et al.*, 350 (1981), 350, Translated to English and cited in, Joost Hiltermann, “Israel’s Deportation Policy in the Occupied West Bank and Gaza,” *Palestine Yearbook of International Law* no. 3 (1986): 171.

After I explained to the Court that I was going to base my claims on international Law, the president of the court, Judge Dov Levin, told me clearly that I would not be allowed to argue that the deportation is prohibited, because this claim had already been made and decided. When I tried to convince him that at least one judge, Judge Haim Cohen, had ruled otherwise [in the past] and that perhaps the present panel of the court (Judges Shoshanna Natanyahu and Eliezer Goldberg) might change the ruling, the answer was an absolute no. I asked if this meant that the Supreme Court was opposed to the Geneva Convention, and [Judge Levin] answered that if it is a question of prohibiting deportation as I claimed in the past, according to Article 49 of the Convention, this is so indeed.²²¹

Therefore, victims of forced displacement in the OPT could not find the right remedy in the court because it does not recognize the applicability of the GCIV and especially Article 49. In light of this framework, the crime of forced displacement has nothing to stop it.

However, the displacements conducted by Israel are not only contrary to international criminal law, but other bodies of international law. This will be discussed in the following sections.

4.3.2 Deprivation from Legal Status

It was mentioned in Chapters 2 and 3 above that Israel's policies deprived those displaced beyond its borders in 1948 and beyond the lines of the occupied territory in 1967, from acquiring a legal status, and further deprived additional hundreds of thousands from enjoying such status. In the first instance, the refugees were excluded from citizenship, and in the second they were excluded from the residency status that Israel gave to the population under occupation. This section will examine the legality of this practice in light of the principles of state succession, law of nationality, and the IHL.

4.3.2.1 Denationalization of the 1948 Palestine Refugees

As mentioned in the introductory section in Chapter 1, Palestine was part of the Ottoman State between 1516 and 1917. It then did not have a special status. It was similar to other areas that were turned later into independent states such as Syria, Iraq, and

²²¹ Translated from Hebrew in, Hiltermann, "Israel's Deportation Policy in the Occupied West Bank and Gaza," 173.

Jordan. Ottoman law applied in Palestine and all Palestinians, regardless of their religious or ethnic background, were citizens of the Ottoman state.²²²

In 1917, Palestine was occupied by the United Kingdom. The victors of the First World War drew borders in the areas they occupied from the Ottoman State, and established a number of mandates that aimed at qualifying these areas to become independent countries. Britain, the mandatory power in Palestine, regulated Palestinian citizenship first by issuing a nationality certificate to Ottoman citizens who resided in Palestine and intended to reside permanently therein.²²³ Then, in 1922, it introduced a law for elections called "*Palestine Legislative Council Election order in Council*,"²²⁴ which introduced what Qafisheh called a "provisional citizenship" which defined Palestinian citizens as "Turkish subjects habitually resident in the territory of Palestine at the date of commencement of this order."²²⁵

Later, in 1924, Britain signed the Treaty of Lausanne with Turkey in which the Ottoman State ceased to exist and was succeeded by smaller states. The nationality of its subjects was regulated by Article 30 of the treaty which stated:

Turkish subjects habitually resident in territory which in accordance with the provisions of the present Treaty is detached from Turkey will become *ipso facto*, in the conditions laid down by the local law, nationals of the State to which such territory is transferred.²²⁶

This provision of the Lausanne agreement meant that the residents of every territorial unit cut out of the Ottoman state will automatically enjoy the citizenship of the state that will be established in that territory.

Following the principle of *ipso facto* citizenship for habitual residents in the case of succession of states, Britain enacted the "*Palestinian Citizenship Order 1925*" on July

²²² Mutaz Qafisheh explains that in 1869, the Ottoman state enacted a law of Nationality that was territorial rather than religious based. Prior to that, it used to consider all Muslims to be its citizens, and all non-Muslims in its territory as protected individuals on whom the laws apply, except for personal affairs issues (such as marriage, divorce, and inheritance) where their religious traditions applied to them. Qafisheh, "The International Law Foundations of Palestinian Nationality," 33.

²²³ Ibid., 68.

²²⁴ *Palestine Legislative Council Election Order in Council*, 1922.

²²⁵ Qafisheh, "The International Law Foundations of Palestinian Nationality," 82.

²²⁶ "Lausanne Peace Treaty," Article 30.

1925.²²⁷ The first article of the order stated: “Turkish subjects resident in the territory of Palestine... shall become Palestinian citizens.”²²⁸

With the treaty of Lausanne, Palestine's status as a separate entity was legalized. Turkey no longer had claims over Palestine and the connection between the inhabitants and their previous state was finished. Now, Palestine became an entity and its inhabitants became the citizens of this entity.

Nothing interrupted the legal link between the inhabitants of Palestine and their state until the 1952 Israeli Nationality Law²²⁹ was enacted.²³⁰ But what is the legality of this procedure? Can an emerging state legalize a denial of the link between a people and their ancestral land based on its municipal law?

Nationality regulations and laws are “in principle” within the sole jurisdiction of any given state.²³¹ In 1923, the Permanent Court of International Justice stated that while international relations and law are developing, the issue of Nationality is “in principle” a domestic issue.²³² However, this jurisdiction is not absolute.²³³ One of the cases in which a state is expected in international law to grant its citizenship is in cases of state succession.

State succession happens when sovereignty changes within certain territory.²³⁴ For example, when Palestine was made a separate entity and was bound to become an independent state after being cut out of the Ottoman State, a succession took place. The issue of Nationality of the inhabitants of a territory upon state succession has been an issue that international law had to deal with, especially given that after the end of the First

²²⁷ Government of Palestine, *Palestine Citizenship Order 1925, Legislation of Palestine, Vol. I, P. 37, 1925.*

²²⁸ Ibid.

²²⁹ *Nationality Law, 5712-1952, Published in Sefer Ha-Chukkim No. 95 of the 13th Nisan, 5712 (8th April, 1952), P. 146, 1952.*

²³⁰ This was explained in considerable detail in Chapter 2 above.

²³¹ Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford University Press, 2003), 373.

²³² Permanent Court of International Justice, UK v. France, Nationality Decrees Issued in Tunis and Morocco (French Zone), 40 (PCIJ Advisory Opinion 1923).

²³³ Brownlie, *Principles of Public International Law*, 376.

²³⁴ Paul Weis, *Nationality and Statelessness in International Law* (Brill, 1979), 135; UN General Assembly, “Vienna Convention of Succession of States in Respect of Treaties,” November 6, 1996, Article 2(1)(B).

World War the victors dismantled territories of the Ottoman State and the Austro-Hungarian Empire, and had to regulate the citizenships of the newly established states.

In 1927, C. Luella Gettys traced the international practice which had been stated in several peace treaties.²³⁵ A broadly used principle before and after the First World War was the automatic change of citizenship in cases of change of sovereignty,²³⁶ with a few exceptions such as giving an option to the individual to opt for another citizenship.²³⁷ For example, in the treaty of Lausanne mentioned above, Article 30 gave an automatic citizenship to the “habitual residents” of the states that used to be part of the Ottoman Empire in the state to which their territory was transferred. The British conduct in Palestine followed this principle as shown above.

Also in the late 1920s, the Assembly of States in the League of Nations adopted articles relating to the laws of Nationality. Article 18 stated:

(a) When the entire territory of a state is acquired by another state, those persons who were nationals of the first state become nationals of the successor state, unless in accordance with the provisions of its law they decline the nationality of the successor state.

(b) When a part of the territory of a state is acquired by another state or becomes the territory of a new state, the nationals of the first state who continue their habitual residence in such territory lose the nationality of that state and become nationals of the successor state, in the absence of treaty provisions to the contrary, unless in accordance with the law of the successor state they decline the nationality thereof.²³⁸

Although the rule of automatic citizenship upon state succession was not codified in treaties, it has been argued that this principle has become a customary international rule.²³⁹ The United Nations General Assembly instructed the International Law Commission to codify the principles followed in international law, and then adopted these

²³⁵ C. Luella Gettys, “The Effect of Changes of Sovereignty on Nationality,” *American Journal of International Law* 21 (1927): 268.

²³⁶ *Ibid.*, 269.

²³⁷ *Ibid.*, 271.

²³⁸ Harvard Research in International Law, “Nationality; Responsibility of States; Territorial Waters. Drafts of Conventions Prepared in Anticipation of the First Conference on the Codification of International Law, The Hague, 1930,” *The American Journal of International Law* 23, no. 2 (April 1, 1929): 15.

²³⁹ Gail Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis* (Bethlehem, Palestine: Badil, 2001), 18–21; Victor Kattan, “The Nationality of Denationalized Palestinians,” *Nordic Journal of International Law* 74 (2005): 91; John Quigley, “Displaced Palestinians and a Right of Return,” *Harvard International Law Journal* 39, no. 1 (1998): 207.

principles in a resolution in the year 2000.²⁴⁰ Article 5 of the “Articles on Nationality of Natural Persons in Relation to the Succession of States” makes the following presumption:

Subject to the provisions of the present articles, persons concerned having their habitual residence in the territory affected by the succession of states are presumed to acquire the nationality of the successor state on the date of such succession.²⁴¹

This provision follows the same custom that was followed after the First World War, referred to above. Article 15 follows another custom that has developed over time in international law, the prohibition of discrimination. It states:

States concerned shall not deny persons concerned the right to retain or acquire a nationality or the right of option upon the succession of States by discriminating on any ground.²⁴²

Article 16 codifies the prohibition of denial of citizenship arbitrarily. It provides:

Persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State, or arbitrarily denied the right to acquire the nationality of the successor State or any right of option, to which they are entitled in relation to the succession of States.²⁴³

Jeffrey Blackman explained in 1998 that the principles of state succession derive from human rights principles, as well as other international law principles.²⁴⁴ Among these rights are the right to a nationality, the duty to avoid statelessness, and the norm of non-discrimination. He later explains:

The view is increasingly expressed in international fora that states involved in a succession have the positive obligation to confer nationality on the individuals who possess genuine effective links to the territory in question.²⁴⁵

Applying the rules above, one can see that Israel has violated them in its nationality legislation in 1952. First, it denied the citizenship of “habitual residents” of Palestine who not only resided in Palestine, but also held a Palestinian Nationality. The implementation of the principles above meant that the Palestinian citizens who resided in

²⁴⁰ UN General Assembly, “Resolution 55/153,” December 20, 2000.

²⁴¹ Ibid., Annex: “Nationality of natural persons in relation to the succession of States,” Article 5.

²⁴² Ibid., Article 14.

²⁴³ Ibid., Article 16.

²⁴⁴ Jeffrey L. Blackman, “State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law,” *Michigan Journal of International Law* 19 (1998 1997): 1172.

²⁴⁵ Ibid., 1191.

the areas that became Israel in 1948 were *ipso facto* Israeli citizens upon Israel's establishment. Therefore, their exclusion from Israel's citizenship barring them stateless is seen as de-nationalization.

Secondly, Israel made two separate laws of Nationality, one for Jews and one for non-Jews, which effectively deprived most of the non-Jewish population from its citizenship. This clearly violates the principle of non-discrimination on bases of race and religion.

Finally, the deprivation of nationality was arbitrary. There was no process according to which the individual can decide on whether to live under Israeli sovereignty and acquire its nationality, or otherwise. The Israeli Nationality law as shown above simply decides that only Palestinian citizens who were physically in Israel and succeeded to register themselves were to become citizens, while the rest of the population who was driven out or fled during the war and was not allowed to return after it had no such option.

It is worth mentioning, though, that in one case prior to the enactment of the nationality law an Israeli court decided a case based on the principles of international law shown above. In 1951 the Tel Aviv District Court, concluding from an international law perspective that habitual residents in what became Israel after the war were entitled to its citizenship held:

So long as no law has been enacted providing otherwise my view is that every individual who, on the date of the establishment of the state of Israel was resident in the territory which today constitute the state of Israel is also a National of Israel. Any other view must lead to the absurd result of a state without nationals.²⁴⁶

Unfortunately, when Israel enacted the law of Nationality it decided not to follow this rule, but rather to select its citizens based on their ethnic and religious background. Its nationality law has violated the principles of nationality upon state succession, and has done so on discriminatory grounds. Hence, the de-nationalization of the majority of Palestinians has been contrary to international law.

²⁴⁶ A.B. v. M.B., 17 ILR: 110 (Tel Aviv District Court 1951).

4.3.2.2 Revocation of resident status from OPT refugees

As explained in Chapters 2 and 3, when Israel occupied the West Bank and Gaza, it conducted a census in the whole area of the occupied territory, and later gave the residents who were physically present in the OPT and who had not been displaced by the war Israeli-issued ID cards and created its own population registries for the Palestinian population residing in the OPT.²⁴⁷ Those who did not receive Israeli-issued ID cards were not allowed to reside in their homes and were considered mere aliens to the occupied territory. In addition, a quarter million of those who remained but failed to comply with the complicated, unpublished and quickly changing residency regulations were also stripped from their status as residents in the OPT. All of these policies served to displace more Palestinians, and to make the return of those already displaced illegal and impossible.

It has already been argued above that forced displacements, regardless of whether they were meant to be durable or temporary, are illegal and amount to war crimes and crimes against humanity.²⁴⁸ However, there are further grounds of illegality for Israel's status revocation policies. An important one of these grounds, which is understudied in the Palestinian-Israeli context, is a well-established customary doctrine in IHL that an occupying power's authority to alter laws in an occupied territory is extremely limited. This principle has been adopted in the 1899 and 1907 Hague Regulations stating:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.²⁴⁹

This article has set one of the basic principles of the law of occupation. It is well recognized that an occupying power is not a sovereign in the territory it occupies, but rather a temporary administrator; which leads to the rule that the occupier is not entitled to change the laws in force, except for the narrow cases when the security of its forces or

²⁴⁷ See Chapters 2 and 3 above.

²⁴⁸ See sec. 4.3.1 above

²⁴⁹ "Hague Convention of 1899", Article 43; "Hague Convention of 1907", Article 43.

the needs of the local population make it necessary.²⁵⁰ This principle was also confirmed by the GCIV, which stated:

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.²⁵¹

According to the authoritative commentary of the GCIV, this article “amplifies” the provisions of Article 43 of the Hague Regulations.²⁵² It is considered as an “uncontested principle of international law,” as Dinstein asserts.²⁵³ It is based on the principle which obliges the occupying power not to change the laws in force in the occupied territory, except in narrow necessary cases as shown above. The GCIV commentary further explains that the Geneva conventions were adopted in the aftermath of all the atrocities of the Second World War, during which the rights of populations of occupied territories were severely derogated as a result of the occupying powers’ change of institutions in the occupied states, as well as their illegal annexation of occupied territories.²⁵⁴ Against this background, the convention set a clear rule: the rights of the civilian population of the occupied territory shall not be affected by any measures taken by the occupying power.²⁵⁵ To further elaborate on this point, the occupying power is not entitled to make severe changes to the laws and institutions of the occupied territory, and is certainly not allowed to annex such territory. If this happens, nonetheless, then the protection of civilians and their rights shall not be affected.²⁵⁶ Arai explains that the occupying power’s authority to legislate in an occupied territory must be bound by its obligations according to

²⁵⁰ Arai, *The Law of Occupation*, 42–3; Dinstein, *The International Law of Belligerent Occupation*, 49; Cavanaugh, “The Israeli Military Court System in the West Bank and Gaza,” 202; Benvenisti, *The International Law of Occupation*, 8.

²⁵¹ “Convention (IV) Relative to the Protection of Civilian Persons in the Times of War”, Article 47.

²⁵² Pictet, *Fourth Geneva Convention Commentary*, 274.

²⁵³ Dinstein, *The International Law of Belligerent Occupation*, 50.

²⁵⁴ Pictet, *Fourth Geneva Convention Commentary*, 273–6.

²⁵⁵ Arai, *The Law of Occupation*, 139.

²⁵⁶ Benvenisti, *The International Law of Occupation*, 5.

international law applicable in an occupied territory, namely, relevant international human rights law and IHL.²⁵⁷

If we examine Israel's conduct in the OPT against the provisions of the Hague Regulations and GCIV, a clear violation can be detected. When Israel in 1967 prevented those who were displaced from return; enacted special "infiltration" orders to criminalize any attempt to return; and created a new system of residency that gives only those who are registered in Israel's population registry the right to reside in the OPT, it violated the rights of the inhabitants of the OPT who were excluded from the right to reside therein.²⁵⁸ There is no provision in international law that allows an occupying power to create new rules of residency in the occupied territory. On the contrary, the occupying state must respect the legal system in the occupied territory and allow normal civilian life to proceed,²⁵⁹ and only introduce legal amendments for security purposes or for the benefit of the civilians of the occupied territory.²⁶⁰

Prior to the Israeli occupation, the Palestinian inhabitants of the West Bank and Gaza were free to leave for prolonged periods of time and return without any restrictions. There were no reported restrictions on child registration or family unification. Movement between Jerusalem and the rest of the West Bank was also not restricted and a Palestinian could choose to reside anywhere in the West Bank.²⁶¹

The annexation of Jerusalem and the treatment of its native population as mere residents clearly violate the obligation of the occupying power not to affect the rights of the local population. By making their status so vulnerable for revocation, the regime imposed by Israel institutionalized a continuous violation of the right to reside and

²⁵⁷ Arai, *The Law of Occupation*, 132–6.

²⁵⁸ Human Rights Watch, *"Forget About Him, He's Not Here:" Israel's Control of Palestinian Residency in the West Bank and Gaza* (New York, N.Y.: Human Rights Watch, February 2012), 103–4.

²⁵⁹ Arai, *The Law of Occupation*, 98–101.

²⁶⁰ Iain Scobbie et al., *Expert Opinion: Submitted to the Israeli High Court of Justice in the Matter of Dqeiqa Village Council V. The Military Commander of the West Bank* (on behalf of Rabbis for Human Rights and Dqeiqa Village Council, 2011), para. 21, http://www.diakonia.se/documents/public/ihl/ihlanalysis/ian_scobbie_expert_opinion_forced_removal_15.11.11.pdf.

²⁶¹ The Jordanian constitution, which was applicable until the occupation, forbade in Article 9 the deportation of Jordanians, and provided the right of each Jordanian to choose his place of residence within the boundaries of the Kingdom. See, *The Constitution of the Hashemite Kingdom of Jordan*, 1952.

naturally give this right to one's children. The annexation and the applied regime represent a doubled violation. First, the annexation itself is illegal and violates the principle that prohibits territorial acquisition by force, as argued above.²⁶² Secondly, while the annexation took place anyway, the rights of the civilian population must not have been affected by such annexation, as clearly expressed by Article 47 of GCIV.

In the rest of the occupied territory, an annexation did not take place. However, the severe changes Israel introduced to the system of residency changed fundamentally the rights that the inhabitants of the West Bank and Gaza enjoyed.²⁶³ These military orders that have been applicable since 1967 have cemented the continued displacement for those who had to leave or were already abroad when the war took place, and further inflicted many more displacements.

Accordingly, the regimes designed by Israel in West Bank and Gaza as well as annexed East Jerusalem are illegal in international humanitarian law. Their illegality stems from two principles in IHL. First, a state is expected refrain from changing the laws and regulations in an occupied territory, and to only introduce amendments for the security of its forces or the welfare of the local population. Secondly, if the occupying power does introduce legal and institutional amendments to the legal system in the occupied territory, these amendments must not affect the rights of the population.

4.3.3 Prevention from Return and International Law

Another way in which Israel violated international law is by preventing the Palestinian refugees and displaced persons from return as explained in Chapters 2 and 3. This policy was in violation of Israel's obligations toward other states, and toward its own citizens' human rights in 1948, and the human rights of the residents of the occupied territory in 1967. This section will briefly examine prevention of return as a violation of international law in two international legal bodies: the law of Nationality, and International Human Rights Law. It should be noted that the right of the Palestinian refugees and IDPs to return as a remedy to forced displacement will be analysed in

²⁶² See sec. 4.2.2.2 above.

²⁶³ See discussion in Chapter 3

Chapter 5, which will discuss this right and its relationship with other remedies within a transitional justice framework. This section's scope is limited to presenting an analysis of how the prevention from return, itself, has been in violation of international law.

The first ground regarding the illegality of the prevention of one's right to enter his own country is the international norms regulating nationality, which developed to be known as the "Law of Nationality."²⁶⁴ A violation toward the state to which this person is forced to go, which "according to accepted principles of international law" has no obligation to admit him.²⁶⁵ States have no obligation to allow aliens to reside in their territory.²⁶⁶ Thus, any state is under an obligation vis-à-vis other states to admit its nationals, that is, to allow them to return to its territory.²⁶⁷ While this obligation toward other nations is not provided in positive law, it is considered to be part of customary international law.²⁶⁸ Weis explains the logic behind this as being based on the "conception of nationality:"

If states were to expel their nationals to the territory of other states without the consent of those states or were to refuse readmission, thus forcing states to retain on their soil aliens whom they have the right to expel under international law, such action would constitute a violation of the territorial supremacy of these states. It would cast a burden on them which, according to international law, they are not bound to undertake, and which, if persistently exercised, would necessarily lead to a disruption of orderly, peaceful relations between states within the community of nations.²⁶⁹

Following on the same logic, a country may not revoke a citizen's nationality in order to expel him or deny him readmission to his own country. Similarly, in cases when the state has actually denationalized a citizen, this state has an obligation to readmit him

²⁶⁴ As will be explained later, these regulations started to get codified in the first half of the last century. See, Harvard Research in International Law, "Nationality; Responsibility of States; Territorial Waters. Drafts of Conventions Prepared in Anticipation of the First Conference on the Codification of International Law, The Hague, 1930."

²⁶⁵ Weis, *Nationality and Statelessness in International Law*, 45.

²⁶⁶ Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*, 24.

²⁶⁷ Weis, *Nationality and Statelessness in International Law*, 45.

²⁶⁸ Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*, 24.

²⁶⁹ Weis, *Nationality and Statelessness in International Law*, 47.

in its territory.²⁷⁰ Hannum argues that while denationalization per se might be admissible, it is prohibited if it is done in violation of the principle of non-discrimination, or if its intention was to expel or prevent the return of a citizen.²⁷¹ In 1927, Sir John Fischer Williams wrote:

There will be general agreement that a state cannot, whether by banishment or by putting an end to the status of nationality, compel any other state to receive one of its own nationals whom it wishes to expel from its own territory.²⁷²

In 1924, the Fifth Assembly of the League of Nations instructed the codification of international legal principles on several issues, including the international law concerning nationality.²⁷³ The School of Law at Harvard University organized the research, and in collaboration with international legal scholars, took the responsibility to present a draft of the international law of nationality to the Assembly of Nations. Article 20 of this document stated:

A state may not refuse to receive into its territory a person, upon his expulsion by or exclusion from the territory of another state, if such person is a national of the first state or if such person was formerly its national and lost its nationality without having or acquiring the nationality of any other state.²⁷⁴

In its commentary, the drafters of the articles gave several examples of how this article applies. In one of the examples, the commentary explains that even if a citizen takes an oath of allegiance to another country and fights in the armed forces of his own, his country, even if it had a law withdrawing nationality for taking an oath of allegiance to a foreign state, has the obligation to allow him the right to return to it.²⁷⁵

²⁷⁰ Ibid., 53–9.

²⁷¹ Hurst Hannum, *The Right to Leave & Return in International Law and Practice* (Martinus Nijhoff Publishers, 1987), 60–1.

²⁷² John Fischer Williams, “Denationalization,” *British Year Book of International Law* 8 (1927): 61.

²⁷³ League of Nations General Assembly, “Resolution Establishing Committee of Experts for the Progressive Codification of International Law,” September 22, 1924, League of Nations, Official Journal, Special Supplement, No. 21, p. 10.

²⁷⁴ Harvard Research in International Law, “Nationality; Responsibility of States; Territorial Waters. Drafts of Conventions Prepared in Anticipation of the First Conference on the Codification of International Law, The Hague, 1930”, Article 20.

²⁷⁵ Ibid., 77.

This duty to admit, which Goodwin-Gill argues is a basic obligation and is “beyond dispute,”²⁷⁶ and exists in an additional basis in international law, namely the right to return as guaranteed by international human rights law. Such right has been repeatedly confirmed by human rights instruments as will be shown below.

In 1948, the Universal Declaration of Human Rights (UDHR) states in Article 9 that: “No one shall be subjected to arbitrary arrest, detention or exile,”²⁷⁷ and in Article 13 (2) expresses that: “Everyone has the right to leave any country, including his own, and to return to his country.”²⁷⁸ The International Covenant on Civil and Political Rights (ICCPR) states: “no one shall be arbitrarily deprived of the right to enter his own country.”²⁷⁹ The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) prohibited the prevention of the “right of return to one’s country” on discriminatory grounds based on, among other criteria, race and religion.²⁸⁰ Regional human rights treaties also incorporate the right of one to enter his country.²⁸¹ This wide adoption of the “right to return” to or “right to enter” one’s country has been adopted by so many human

²⁷⁶ Guy Goodwin-Gill, “The Right to Leave, the Right to Return and the Question of a Right to Remain,” in *The Problem of Refugees in the Light of Contemporary International Law Issues: Papers Presented at the Colloquium Organized by the Graduate Institute of International Studies in Collaboration with the Office of the United Nations High Commissioner for Refugees, Geneva, 26 and 27 May, 1994*, ed. Vera Gowlland Debbas (Martinus Nijhoff Publishers, 1996), 100.

²⁷⁷ “The Universal Declaration of Human Rights” (G.A. Res. 217A (III), U.N. Doc. A/810, at 71, 1948), <http://www.un.org/en/documents/udhr/index.shtml>, Article 9.

²⁷⁸ *Ibid.*, Article 12.

²⁷⁹ UN General Assembly, “International Covenant on Civil and Political Rights”, Article 12(4).

²⁸⁰ UN General Assembly, “International Convention on the Elimination of All Forms of Racial Discrimination” Article 5(d)(ii) .

²⁸¹ Organization of American States, “American Convention on Human Rights, ‘Pact of San Jose’” (Costa Rica, November 22, 1969), Article 22(5) stating: “No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.”; Organization of African Unity, “African Charter on Human and Peoples’ Rights,” June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 12(2) stating: “Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.”; Council of Europe, “European Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols Nos. 11 and 14,” November 4, 1950, ETS 5, Protocol no. 4, Article 3. Stating that “No one shall be expelled either of an individual or a collective measure from the territory of a state of which he is a national,” and that: “No one shall be deprived of the right to enter the territory of the state of which he is a national.”

rights instruments that it became widely considered as a norm of customary international law.²⁸²

The use of the term “arbitrarily” in both the UDHR and ICCPR, the established understanding is that the only exception to the right to enter would be for the cases where exile is a recognized penalty in the law itself, which has almost disappeared.²⁸³ When these instruments were introduced, a number of countries still had exile as a recognized punishment in their penal laws. Beyond this exception, human rights law has not accepted any other ground for the prevention from return.

The UN Human Rights Committee, which has the official responsibility to interpret the ICCPR, has provided some useful guidance to understanding the term “arbitrarily” and how widely or narrowly it can be interpreted. Their 1999 “General Comment No. 27” provided:

In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.²⁸⁴

Hannum, commented providing useful insight to interpreting the concepts explained above. He argues that while there are limited cases under international law where the prevention from return is lawful, this is not applicable when such prevention is

²⁸² Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*, 36; Kathleen Lawand, “The Right to Return of Palestinians in International Law,” *International Journal of Refugee Law* 8, no. 4 (October 1, 1996): 544; Hannum, *The Right to Leave & Return in International Law and Practice*, 60; Eric Rosand, “The Kosovo Crisis: Implications of the Right to Return,” *Berkeley Journal of International Law* 18, no. 2 (2000): 232; Henckaerts, *Mass Expulsion in Modern International Law and Practice*, 79.

²⁸³ Henckaerts, *Mass Expulsion in Modern International Law and Practice*, 78–9; Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*, 38.

²⁸⁴ UN Human Rights Committee, “ICCPR General Comment No. 27: Article 12 (Freedom of Movement),” November 2, 1999, para. 21, U.N. Doc. CCPR/C/21/Rev.1/ Add.9.

discriminatory, and as such, in violation of the well-established principle in international law preventing racial discrimination, even if it is based on a legal and judicial system.²⁸⁵

This right to return or enter is guaranteed to every person in relation to “his own country.” The meaning of this expression (i.e. “own country”) could be interpreted widely to include not only the country to which one is a citizen, but also other types of links with the country including permanent residency; but it can also be interpreted narrowly to include only citizens.²⁸⁶ This has also been articulated by the UN Human Rights Committee in its “General Comment No. 27,” where it first explained that the term “his own country” does not only mean the country of his citizenship. In addition to citizens, it also

embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.²⁸⁷

Hence, according to this interpretation, the right of return is not only for citizens, but also for those who never managed to gain the citizenship of a country but at the same time cannot be considered aliens. It then includes several categories of persons including stateless persons and permanent residents.

It should be noted that this right has appeared in the form of “right to return” in the UDHR, and “right to enter” in the ICCPR. The reason for the use of the wording “enter” rather than “return” in the ICCPR was in order to include those who might have never been in their country but were still entitled to be admitted therein, such as children of nationals or residents born abroad. This has also been addressed by the UN Human Rights Committee. It interpreted “enter” as follows:

²⁸⁵ Hannum, *The Right to Leave & Return in International Law and Practice*, 45.

²⁸⁶ *Ibid.*, 56–7.

²⁸⁷ UN Human Rights Committee, “ICCPR General Comment No. 27: Article 12 (Freedom of Movement),” para. 20.

The right of a person to enter his or her own country recognizes the special relationship of a person to that country. The right has various facets. It implies the right to remain in one's own country. It includes not only the right to return after having left one's own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country (for example, if that country is the person's State of nationality). The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries.²⁸⁸

The UN Human Rights Committee's interpretation indicates that those who were born outside their own country have the same right to enter as those who exited their country.

In addition to the right to enter one's country being protected as such, it has also been frequently rightly given special significance because of its relation to other rights that can only be enjoyed by one if he was allowed to enter his country. In 1963, the United Nations published a study prepared by Special Rapporteur of the Sub-Commission on Prevention of Discrimination, Jose Ingles discussing discrimination in relation to the right to leave and enter one's own country.²⁸⁹ He stressed in his study that discrimination in respect to the right to return needs to be understood in the context of the ability to fulfil other rights. He argued:

A national normally has considerable interests and ties in his own country and there are many rights which he can enjoy fully only in his own country. These include the right to social security and other cultural life and government of one's own country. In the case of naturalized citizens, denial of the right to return to their country could have the effect of arbitrarily depriving them of their nationality.²⁹⁰

Indeed, it is inconceivable how one can enjoy his basic rights without being allowed to live in his own country. Alfred De Zayas has agreed with the approach of explaining the right to enter one's country as an essential one to the exercise of other rights. He argued that one can derive from several principles of international human rights

²⁸⁸ Ibid., para. 19.

²⁸⁹ José D. Ingles, *Study of Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country* (New York: United Nations, 1963), 14–5.

²⁹⁰ Ibid.

law what he describes as a “right to a homeland,” that prevents the expulsion from one’s homeland, and gives him the right to return therein.²⁹¹

Implementing these principles on the Israeli conduct in both, its sovereign territory and the OPT will reveal that Israel has violated the internationally recognized right of return. As argued above, Israel is bound by customary international law as well as human rights conventions that it ratified which include the ICCPR and the ICERD.²⁹² Accordingly, it can be argued that by preventing its own nationals and the inhabitants of the OPT from return or entry; Israel has violated international law on a number of grounds. Firstly, it breached the right of all its neighbouring countries as well as others who were obliged to receive the majority of the Palestinian population on their lands, and to settle many of them in poorly built refugee camps. As discussed above, no state has the obligation to receive aliens. Secondly, Israel has violated human rights law by not allowing those who had been displaced to exercise their right to return to Israel or the OPT. As shown above, the bearers of this right are not only the nationals of a country, but also those who were deprived from their nationality, permanent residents and children of nationals (or persons who were illegally deprived of nationality) born aboard.

What can be concluded by the discussion in the present section is that the bearers of the right to return or enter and as such the victims of Israel’s denial of this right include all those who were displaced by Israel’s consistent policies of displacement, citizenship revocation, and residency revocation. Furthermore, the children of these three categories are also victims of Israel’s policy and would be entitled to remedies as will be shown in Chapter 5.

4.4 Conclusion

After examining the legal statuses of the areas from which Palestinians have been forcibly displaced since 1948, this chapter has argued that Israel’s long, widespread and

²⁹¹ Alfred de Zayas, “Illegality of Population Transfers and the Application of Emerging International Norms in the Palestinian Context, The,” *Palestine Yearbook of International Law* 6 (1991 1990): 17; Alfred De Zayas, “The Right to a Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia,” accessed January 12, 2013, <http://alfreddezayas.com/Articles/crimlawforum.shtml>.

²⁹² See sec. 4.2 above.

systematic policy to forcibly displace the majority of the Palestinian population has been contrary to international law on several grounds. First, while forced displacement was condemned since the beginning of the twentieth century, it has actually been consistently prosecuted in international tribunals and courts as a war crime and a crime against humanity since the end of the Second World War. This meant that it was considered a crime before 1948, which leads to the conclusion that when the 1948 exodus was perpetrated, international law had already developed to condemn the crime of forced displacement. The statutes of the ICC and every *ad hoc* tribunal that came to prosecute international crimes after that was consistent in condemning the crime.

In addition, Israel breached additional international legal obligations with its forced displacement policy. First, by preventing those who were to become its citizens upon its establishment as a state from acquiring its citizenship, Israel failed to fulfil its duty to recognize the effect of the international law of state succession and the international law of nationality on automatically passing its citizenship to those habitually living on its territory at the time of the change of sovereignty. In addition, when it introduced new complicated residency regimes in the OPT it breached its obligation as an occupying power to refrain from fundamentally changing the legal system of the occupied territory and to protect the rights of the civilian population when legal amendments take place. Not only did the regime exclude those who were displaced by the war from their right to reside therein, but also produced additional hundreds of thousands of new displaced persons who were stripped from that right. Finally, by preventing millions of Palestinians who are entitled to exercise their right to return to their homes, Israel has breached its obligation in front of other states that should not be forced to receive and keep aliens; as well as its obligations under international human rights law which guarantees a right of each person to enter his country. The discriminatory character of Israel's policy adds another dimension of illegality as well established in international human rights law.

Chapter 5- The Parameters of a Transitional Justice Approach to Addressing Israel's Forced Displacement Policy

Introduction

As argued in Chapters 2 and 3, Israel's goal of changing the demographic balance in Israel and parts of the OPT has been expressed by a number of policies that resulted in the mass forced displacements of Palestinians. The fact that these displacements are contrary to international law, as shown in Chapter 4, has consequences in international law. These consequences are twofold: first, an unlawful conduct in international law results in a responsibility to provide remedies to the victims;¹ and second, when a breach of international law is an international crime an obligation to prosecute the perpetrators emerges.² Unfortunately, until today no remedies have been given to the displacement victims.

The transitional justice framework has been used in several countries around the world to redress victims of human rights violations through a number of measures that articulate the types of injustice that they went through. This chapter will present an analysis of how transitional justice can meaningfully and comprehensively address the problem of displacement and determine the principles that govern this framework in an endeavour to redress the victims.

Before making the transitional justice analysis, this chapter will start by reviewing the status of the victims of Israel's displacement in the Palestinian-Israeli peace process framework. The failure of this framework to redress the victims will be examined in an

¹ This will be explained in sec. 5.2.1 below.

² This will be discussed in sec. 5.2.2 below.

endeavour to clarify the reasons behind it. After that, the international legal framework for articulating human rights violations will be discussed, focusing on the appropriate legal remedies that are expected to be delivered following a wrongful act, according to the laws of state responsibility and the principles of individual criminal responsibility.

Then, the chapter will turn into defining the parameters that govern a transitional justice approach to redressing displacement problems. This will be done by examining the main features of transitional justice as a theoretical framework and then analysing each of the remedies affiliated with it focusing on their implications on displacement issues. Each of the remedies will be studied theoretically by learning from the transitional justice literature, and practically by referring to examples where countries sought to redress their victims by using transitional justice processes.

5.1 Displacement within the Framework of the Current “Peace Process”

The framework for Israel’s “peace process” with its neighbours and the Palestinian People can be traced back to 1978, when Israel signed its peace treaty with Egypt, known as “The Camp David Accords,” ending the state of war and conflict between the two states. The treaty consisted of two agreements, the first regulating bilateral Israeli-Egyptian relations.³ The second which was called “The Framework for Peace in the Middle East,” outlined a framework and the terms of reference for further peace agreements between Israel and parties it is in conflict with, and invited “other parties to the Arab-Israeli conflict to adhere to it.”⁴ The framework dictated that Egypt, Jordan and “representatives of the Palestinian people” shall agree on establishing a self-government in the West Bank and Gaza.⁵

Indeed, in 1993 the Palestine Liberation Organization (PLO) and Israel launched a bilateral “peace process” by signing an interim peace agreement famous with its unofficial

³ Arab Republic of Egypt and Israel, “The Camp David Accords: Framework for the Conclusion of a Peace Treaty Between Egypt and Israel,” September 17, 1978, <http://www.jimmycarterlibrary.gov/documents/campdavid/frame.phtml>.

⁴ Arab Republic of Egypt and Israel, “The Camp David Accords- The Framework for Peace in the Middle East,” September 17, 1978, Full Text published in President Jimmy Carter’s Library, available at: <http://www.jimmycarterlibrary.gov/documents/campdavid/accords.phtml>.

⁵ Ibid.

name, the “Oslo Accords,” and known officially as the Declaration of Principles on Interim Self Government (hereinafter DOP).⁶ According to this agreement, the PLO and Israel were to enter a five-year interim period (as laid out in Camp David) during which a transitional Palestinian self-government would be established with limited authorities and jurisdiction while “permanent status negotiations” commence.⁷ In 1995, the “Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip” (hereinafter the Interim Agreement) was signed, detailing the arrangements of the transitional period and deferring the same “permanent status” issues to the negotiations that will commence once the Palestinian Authority is installed in parts of the West Bank and Gaza.⁸ In addition, Israel and Jordan signed a peace treaty in 1994 ending the state of conflict between the two states.⁹

It can be noticed that within the three bilateral peace tracks the displacement problem was dealt with in the same way. In fact, the three agreements follow the same framework that was laid out in the Camp David Accords. This framework has divided the issue of displacement into several separate problems; only some of which were tackled in the process and each of which would be dealt with in a separate process and according to a different rule. Reference was made to the refugees of 1948 war,¹⁰ the “displaced persons” of 1967 war¹¹ and those whose residencies were revoked in the West Bank (excluding East Jerusalem) and Gaza Strip between 1967 and 1994 as will be shown below.¹² The rest of the internal displacement and deportations explained in Chapter 3 were not mentioned. The following sub sections will examine the principles laid out for tackling the plight of those displaced in each of the displacement waves.

⁶ Israel and Palestine Liberation Organization, “Declaration of Principles on Interim Self-Government Arrangements” (Signed in Washington DC, September 1993).

⁷ Ibid., Article V.

⁸ Israel and Palestine Liberation Organization, “Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip” (Washington, D.C., September 1995), Article XXXI (5).

⁹ Israel and Jordan, “Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan” (Washington, DC, October 26, 1994).

¹⁰ See, sec. 5.1.1 below.

¹¹ See, sec. 5.1.2 below.

¹² See, sec. 5.1.3 below.

5.1.1 The 1948 Exodus and the “Peace Process”

Those who were forcibly displaced outside the borders of the new-born Israel back in 1948 were the only group that was referred to as “refugees.”¹³ Reference to them came to include them as part of the deferred issues that will be tackled in the “permanent status negotiations” which were defined in the DOP as: “Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours, and other issues of common interest.”¹⁴ This has been the case in the three bilateral agreements. In the 1978 Camp David Accords, the reference to the refugees came as follows:

Egypt and Israel will work with each other and with other interested parties to establish agreed procedures for a prompt, just and permanent implementation of the resolution of the refugee problem.¹⁵

Similarly, Jordan’s peace treaty with Israel mentioned that the refugees issue will be resolved in a multilateral forum, but in this treaty it was provided that the solution of the issue should be “in accordance with international law.”¹⁶

Until today, there has not been an agreed solution to the plight of the victims of this wave of displacement and it seems that it is the most difficult to resolve within the current framework. The difficulty is due to Israel’s position which is based on two pillars: denial of responsibility and rejection of consequences.¹⁷ The main reason for this position

¹³ In the peace treaties between Israel, Egypt, Jordan, and the PLO the term “refugees” was used in reference to those displaced in 1948 outside the borders of the newborn Israel, and the term “displaced persons” was used for all those displaced in the 1967 war. See, Arab Republic of Egypt and Israel, “The Camp David Framework Agreement,” Article A(1)(e) & (F); Israel and Jordan, “Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan,” Article 8; Israel and Palestine Liberation Organization, “Declaration Of Principles On Interim Self-Government Arrangements,” Article XII; Israel and Palestine Liberation Organization, “Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip,” Article XXVII.

¹⁴ Article V (3), Israel and Palestine Liberation Organization, “Declaration Of Principles On Interim Self-Government Arrangements.”

¹⁵ Arab Republic of Egypt and Israel, “The Camp David Framework Agreement,” Article A(1)(F).

¹⁶ There was no explicit reference to any specific principles of international law. However, the reference to international law in the Jordanian-Israeli agreement is unique if compared with Israel’s agreements with Egypt and the PLO. See, Israel and Jordan, “Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan,” Article 8.

¹⁷ This was explained in Chapter 2. However, it remains important to stress that the two pillars of the Israeli policy are connected. On the one hand, Israel sustains until the current day that it did not forcibly displace Palestinians in 1948, blames the refugees and the Arab countries for the displacement and disputes

is the very same reason that has been behind all the displacement waves and methods explained in this thesis: demography. Preserving a Jewish majority is not a hidden goal in Israel and the main reason behind Israel's position regarding the refugees is to keep this majority.¹⁸

In fact, the Israeli strict position on this front has influenced international actors and even the Palestinian leadership. For example, in 2003 the "Quartet for the Middle East," which is a mediation body formed by the United States, the European Union, Russia and the United Nations, suggested a peace plan known as the "Road Map" to peace which called for reaching a final status agreement in 2005 that includes "an agreed, just, fair and realistic solution to the refugee issue."¹⁹ The use of the word "realistic" connotes a waiver of the Palestinian claim on the right of return. As Lynn Welchman noticed, the Road Map contained "no reference to international law or indeed to any framework external to terms agreed bilaterally or proposed by particular third parties."²⁰

Israel did not find this sufficient and ended up accepting the Road Map with 14 reservations, one of which was:

the number of those displaced during the war. Then, the official political position of Israel is that the refugees should be resettled outside Israel as a permanent solution to their problem. See, Danny Ayalon, *The Truth About the Refugees: Israel Palestinian Conflict*, 2011, http://www.youtube.com/watch?v=g_3A6_qSBBQ&feature=youtube_gdata_player; Nur Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem* (London: Pluto, 2003), 67–8; Steven Glazer, "The Palestinian Exodus in 1948," *Journal of Palestine Studies* 9, no. 4 (1980): 97.

¹⁸ Israel views the demographic issue as a "security" or even an "existential" question for the state of Israel. Studies have been consistently made to observe demographic changes under the current status quo, and a great fear of the natural increase of the Palestinian population in Israel is consistently cited. In the parameters of this mentality, it is perceived in Israel that a potential return of millions of refugees is the biggest threat to the state. See, Dov Friedlander and Calvin Goldscheider, "Peace and the Demographic Future of Israel," *The Journal of Conflict Resolution* 18, no. 3 (1974): 486–501; Monica Duffy Toft, "Demography and National Security: The Politics of Population Shifts in Contemporary Israel," *International Area Studies Review* 15, no. 1 (March 1, 2012): 30; Elia Zureik, "Demography and Transfer: Israel's Road to Nowhere," *Third World Quarterly* 24, no. 4 (2003): 621; Yasser Darweesh, *Political Solutions for the Palestinian Refugee Issue and Peace Negotiations' Horizons*, SSRN Scholarly Paper, Working Paper Series 2011/36 (ARA) (Birzeit: Forced Migration and Refugee Unit- Birzeit University, 2011), 9, <http://papers.ssrn.com/abstract=2009274>; Salim Tamari, "Palestinian Refugees and the Palestinian-Israeli Negotiations," *Journal of Palestine Studies* 29, no. 1 (1999): 87.

¹⁹ The Quartet on the Middle East Peace, "A Performance-based Roadmap to a Permanent Two-state Solution to the Israeli-Palestinian Conflict," April 30, 2003.

²⁰ Lynn Welchman, "The Role of International Law and Human Rights in Peacemaking and Crafting Durable Solutions for Refugees: Comparative Comment," in *Rights in Principle-Rights in Practice: Revisiting the Role of International Law in Crafting Durable Solutions for Palestinian Refugees*, ed. Terry Rempel, 2009, http://www.badil.org/phocadownload/Badil_docs/publications/ex-forum-layout-final-S.pdf.

... declared references must be made to Israel's right to exist as a Jewish state and to the waiver of any right of return for Palestinian refugees to the State of Israel.²¹

With this reservation, Israel introduced a new element to its relationship with the Palestinians that became a consistent demand from the Palestinian leadership and got to be conveyed through every possible forum. The PLO's recognition of Israel as a state is not sufficient anymore, but this recognition needs to be combined with a strange recognition that Israel is a Jewish state. As the Palestinian intellectual Sari Nusseibeh eloquently describes it, this new "mantra" means

before final status negotiations have even started, that Palestinians would have then given up the rights of about 7 million Palestinians in the diaspora to repatriation or compensation.²²

In 2011, Al-Jazeera News Network and the Guardian published an enormous leak of 1700 documents on the negotiations between the PLO and Israel.²³ These leaks showed that, under pressure from the Israeli negotiators and American and French mediators, Palestinian negotiators were ready to agree on a "symbolic" return of the refugees as opposed to receiving all the remedies.²⁴ The documents reflect that the PLO was ready to accept an offer that entails the return of 10,000 out of five million Palestinian refugees within a period of 10 years.²⁵ Nonetheless, in later negotiations Israel withdrew this offer. Tsipi Livni, while negotiating with the PLO in her capacity as Israel's minister of foreign affairs, has been quoted explaining the rationale behind her full refusal to accept any responsibility for the refugees:

²¹ "Israel's Road Map Reservations," *Haaretz.com*, accessed November 30, 2012, <http://www.haaretz.com/print-edition/news/israel-s-road-map-reservations-1.8935>.

²² Sari Nusseibeh, "Why Israel Can't Be a 'Jewish State' - Opinion - Al Jazeera English," *Al-Jazeera English*, September 30, 2011, <http://www.aljazeera.com/indepth/opinion/2011/09/201192614417586774.html>.

²³ Gregg Carlstrom, "Introducing The Palestine Papers," *Al-Jazeera English*, January 23, 2011, <http://www.aljazeera.com/palestinepapers/2011/01/201112214310263628.html>.

²⁴ Laila Al-Arian, "We Can't Refer to the Past," *Al-Jazeera English*, January 24, 2011, <http://www.aljazeera.com/palestinepapers/2011/01/201112412266583548.html>; Ian Black and Seumas Milne, "Papers Reveal How Palestinian Leaders Gave up Fight over Refugees," *The Guardian*, January 24, 2011, <http://www.guardian.co.uk/world/2011/jan/24/papers-palestinian-leaders-refugees-fight>.

²⁵ Black and Milne, "Papers Reveal How Palestinian Leaders Gave up Fight over Refugees."

The basis for the creation of the state of Israel is that it was created for the Jewish people. Your state will be the answer to all Palestinians including refugees. Putting an end to claims means fulfilling national rights for all.²⁶

In conclusion, one can clearly see how the ideological motive of having a Jewish majority has imposed its imperatives on the peace process within the Oslo framework. While this position has been maintained by Israel regarding the 1948 refugees, a different position has been expressed by Israel regarding the 1967 refugees, at least in theory. The following section will discuss the principles regarding the future of the victims of this wave of displacement in the Oslo framework.

5.1.2 1967 Refugees in the framework of the “Peace Process”

The framework of the current “peace process” refers to refugees who were displaced outside the borders of the West Bank including East Jerusalem and Gaza Strip during the 1967 war as “displaced persons.”²⁷ The plight of the victims of this wave of displacement was addressed in the Peace Process framework. The 1978 Camp David Accords between Egypt and Israel dictated that after the establishment of a Palestinian “self-government,” the 1967 displacements will be solved in the following way:

During the transitional period, representatives of Egypt, Israel, Jordan and the self-governing authority will constitute a continuing committee to decide by agreement on the modalities of admission of persons displaced from the West Bank and Gaza in 1967, together with necessary measures to prevent disruption and disorder. Other matters of common concern may also be dealt with by this committee.²⁸

²⁶ Gregg Carlstrom, “Qurei to Livni: ‘I’d Vote for You’,” *Al-Jazeera English*, January 24, 2011, <http://www.aljazeera.com/palestinepapers/2011/01/20111241517890936.html>.

²⁷ Reference to all those who were displaced during the 1967 war as “displaced persons” and not “refugees” started in the direct aftermath of the war. A potential explanation of this is that most of those displaced moved towards the non-occupied part of their state or authority. The UN General Assembly issued a resolution then (that will be discussed further below) that used the vague term “displaced” without specifying whether these were refugees or internally displaced. See, UN General Assembly, “Resolution 2252 (ES-V),” July 4, 1967, para. 6; The term “displaced persons” continued to be used in relation to the 1967 refugees and internally displaced from then onward, and was later used in the Israeli-Egyptian, Israeli-Palestinian and Israeli-Jordanian peace agreements. See, Arab Republic of Egypt and Israel, “The Camp David Framework Agreement,” Article A(e); Israel and Jordan, “Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan,” Article 8(2); Israel and Palestine Liberation Organization, “Declaration Of Principles On Interim Self-Government Arrangements,” Article XII; Israel and Palestine Liberation Organization, “Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip,” Article XXVII (1) and (2).

²⁸ Arab Republic of Egypt and Israel, “The Camp David Framework Agreement,” Article A(e).

The Jordanian-Israeli peace treaty provided that the plight of the “displaced persons” shall be negotiated “in a quadripartite committee together with Egypt and the Palestinians” in accordance with international law.²⁹ The DOP, under the title “Liaison and Cooperation with Jordan and Egypt,” provided:

The two parties will invite the Governments of Jordan and Egypt to participate in establishing further liaison and cooperation arrangements between the Government of Israel and the Palestinian representatives, on the one hand, and the Governments of Jordan and Egypt, on the other hand, to promote cooperation between them. These arrangements will include the constitution of a Continuing Committee that will decide by agreement on the modalities of admission of persons displaced from the West Bank and Gaza Strip in 1967, together with necessary measures to prevent disruption and disorder. Other matters of common concern will be dealt with by this Committee.³⁰

“Displaced persons” came to be mentioned another time in the same agreement, within the section that regulates Palestinian elections. After providing some of the principles related to the elections that will be held in the West Bank including East Jerusalem and Gaza Strip, Annex I provided:

The future status of displaced Palestinians who were registered on 4th June 1967 will not be prejudiced because they are unable to participate in the election process due to practical reasons.³¹

This text was negotiated upon request from the Palestinian negotiators, who originally wanted to give the 1967 refugees and those who were displaced from the West Bank and Gaza as a result of Israel’s residency revocation policy the right to participate in the elections even before their return is facilitated.³² The negotiations resulted in not allowing them to participate in the elections until their return, but this provision came to protect their right of return.³³

²⁹ Israel and Jordan, “Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan,” Article 8(2).

³⁰ Israel and Palestine Liberation Organization, “Declaration Of Principles On Interim Self-Government Arrangements” Article XII.

³¹ Ibid. Annex I (3).

³² A. Maoz, “The Emerging Palestinian Democracy Under the West Bank and Gaza Strip Self-Government Arrangements,” in *Israel Yearbook on Human Rights: 1996*, ed. Yoram Dinstein and Fania Domb, vol. 26, Israel Yearbook on Human Rights (Martinus Nijhoff Publishers, 1997), 347.

³³ Ibid.

From all the texts presented above based on the Israeli Egyptian, Jordanian, and Palestinian agreements, it is clear that Israel implicitly recognized the 1967 refugees' right to return to their homes.³⁴ By providing that the role of the "Continuing Committee" is to agree on the "modalities of admission" of the refugees, and by stating that their status should not be prejudiced as a result of their inability to participate in the elections, the current peace framework has, in principle, considered that those displaced outside the borders of Palestine during the 1967 war were entitled to return.³⁵ Their mention in the context of elections is an additional sign that it is expected that they will be fully repatriated; that is, they will receive a status that will allow them to participate in political elections. Despite this recognition, there is no mention of any other remedies that would be offered to the victims.

In practice, once the actual transitional period started and the "Continuing Committee" was formed, several years were wasted in negotiations about who can be considered a displaced person and who would be "admitted" according to this provision. The Palestinians demanded that this includes

Palestinians who were living outside the Occupied Territories at the time of the Six-Day War; Palestinians who left the Occupied Territories during or immediately after the war; Palestinians whose residency in the Occupied Territories had been revoked by Israel; and Palestinians whom Israel deported.³⁶

In contrast, the Israeli initial position was that only those who were directly displaced by the war were to be defined as "displaced persons."³⁷ While the Arab negotiators were demanding the return of over one million "displaced persons," the Israeli negotiators spoke of only 200,000.³⁸

The Continuing Committee met several times between 1995 and 2000, but it never succeeded in solving this problem which seemed to be agreed on theoretically from the

³⁴ Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press, 2003), 247–9.

³⁵ Tamari, "Palestinian Refugees and the Palestinian-Israeli Negotiations," 84; Munir Nuseibah, "Unfreezing the Right of Return: First Stop, Gaza," *Al-Shabaka*, January 22, 2013, <http://www.al-shabaka.org/node/563>.

³⁶ HaMoked and B'Tselem, *Families Torn Apart: Separation of Palestinian Families in the Occupied Territories* (Jerusalem: B'Tselem; HaMoked, 1999), 100.

³⁷ Ibid.

³⁸ Darweesh, *Political Solutions for the Palestinian Refugee Issue and Peace Negotiations' Horizons*, 15; Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem*, 230.

text of the treaties. Rex Brynen argues that the failure of the negotiations to reach a solution was due to Israel's unwillingness to "use the meetings to reach agreement on the issue of displaced persons, preferring to address this in the context of eventual negotiations on the broader refugee issue."³⁹ After the last meeting of this committee in 2000, the idea of simply implementing the "admission" of the "displaced persons" disappeared from the agenda and became part of the major negotiations and as frozen as the whole permanent status issues in the peace process.⁴⁰

5.1.3 Victims of status revocation in the current peace process framework

As explained in Chapter 3, Israel has forcibly displaced a quarter million Palestinians who had not been displaced during or directly after the 1967 war and who were actually counted in the 1967 census and managed to receive an Israeli-issued ID card. This displacement took place as a result of the status revocation policy that Israel has been implementing since its occupation of the West Bank and Gaza Strip in 1967.⁴¹ This policy is known among the Palestinian population mainly as "Sahb Al-Hawiyyat,"⁴² which can be literally translated to "ID Card withdrawal" or to get it to make better sense in English, "ID Card revocation."

The Oslo framework addressed this issue by stating:

³⁹ R. Brynen, "The Past as Prelude? Negotiating the Palestinian Refugee Issue," *Chatham House Briefing Paper* (2008): 3, http://kms2.isn.ethz.ch/serviceengine/Files/RESSpecNet/57346/ipublicationdocument_singledocument/07ACF594-6581-41B3-850D-ECA270AD32D4/en/11721_0608palrefugees_brynen.pdf.

⁴⁰ Ibid., 2; Darweesh, *Political Solutions for the Palestinian Refugee Issue and Peace Negotiations' Horizons*, 15; Salim Tamari, *Palestinian Refugees, Displaced Persons, and the Negotiating Strategy*, Birzeit University Working Paper Series (Birzeit: Forced Migration and Refugee Unit- Birzeit University, 2011), 2, <http://ialiis.birzeit.edu/fmru/etemplate.php?id=164>; Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem*, 230.

⁴¹ See Chapter 3 Sec. 3.2 and 3.3 above.

⁴² This term has been the main one used since the occupation, although other terms are used among the Palestinian community. For example, newspaper articles usually refer to this policy as Sahb Al-Hawiyyat. See, eg., "Al-Hammouri: Sahb 14466 Hawiyya Maqdisyya Munthu A'am 1967 (Al-Hammouri: The Revocation of 14466 Jerusalem ID Card Since 1967)," *Al-Quds Newspaper*, January 28, 2011, <http://www.alquds.com/news/article/view/id/321192>; The use of this term has been also used in English. Notice for example the use of the term "revocation of ID cards" in some of Badil's literature. See, Badil, Resource Center for Palestinian Residency and Refugee Rights and Alternative Information Center, "'Lost IDs' on the Agenda Now," *Article 74*, December 1994, <http://www.badil.org/en/article74/item/643-%E2%80%9Clost-ids%E2%80%9D-on-the-agenda-now>.

A joint committee will be established to solve the reissuance of identity cards to those residents who have lost their identity cards.⁴³

Two significant observations must be highlighted here in terms of the text and content of this provision. First, this article is an implicit recognition of the right of those displaced by residency revocation in the West Bank and Gaza to be repatriated. By not deferring the issue to the final status negotiations and by using the wording “the reissuance of identity cards,” the text confirms that Israel does not have, in principle, an objection to their return. However, the text did not specifically, neither explicitly nor implicitly, recognize the wrongdoing of forcible revocation through residency revocation. Indeed, the verb used in this text is “lost” and it was the residents who lost their “identity cards,” not that their whole status was actively revoked by Israel, contrary to the victims’ basic human rights that were protected by several international legal instruments as explained in Chapter 4.⁴⁴ Moreover, this article does not offer refugees displaced by this method any other remedies. One cannot find any mention of restitution of property, compensation or any other remedies that would be combined with human rights violations.

Secondly, despite the implicit recognition of the victims’ right to return, the interim agreement deferred this action to a “joint committee” that will be “established to solve” this problem. This meant that no immediate remedy was given to this group of victims. When the joint committee met and tried to solve the problem, its fate was similar to that of the “Continuing Committee” that was assigned to deal with the 1967 refugees’ problem. It spent several years negotiating, starting first by reaching a common understanding of what the article means. The initial Israeli point of view was that the goal of this article was “the printing of new identity cards to replace those that Palestinian residents of the Occupied Territories had physically lost.”⁴⁵ When the Palestinian negotiators managed to convince their Israeli counterparts that the purpose was to

⁴³ Israel and Palestine Liberation Organization, “Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip”, Appendix III, Article 28 (3).

⁴⁴ Nuseibah, “Unfreezing the Right of Return.”

⁴⁵ HaMoked and B’Tselem, *Families Torn Apart: Separation of Palestinian Families in the Occupied Territories*, 96.

restore residency status, the negotiators turned to negotiate other questions until Israel froze the population registry in 2000 and stopped accepting to negotiate these questions.⁴⁶

Finally, it is important to notice that this provision excluded the Jerusalem Palestinians' residency revocation problem. This is because the Oslo framework included Jerusalem in the issues of final status negotiations⁴⁷ and thus excluded the Palestinian population of Jerusalem from most of the provisions of the interim agreement, with the explicit exception of their right to participate in the Palestinian Authority's elections.⁴⁸ Having Jerusalem as one of the final status issues meant that Israel's treatment of the annexed city and the implementation of Israel's civil law were not altered. The Palestinian Authority had no jurisdiction on Jerusalem and its people.⁴⁹

5.1.4 Conclusions on the tackling of displacement in the framework of the "peace process"

The focus of the framework followed in Camp David and the subsequent peace agreements with the PLO and Jordan has, thus far, failed to address the injustices inflicted upon the refugees who were forcibly displaced during the wars of 1948 and 1967, as well as those who were displaced through residency revocation throughout the years of the occupation. Despite the clear theoretical distinction between the 1948 refugees, the 1967 refugees (or as the framework refers to them the "displaced persons") and those whose status had been revoked (referred to as "those who lost their ID cards"), the peace process has not given remedies to most of these victims until now.⁵⁰

⁴⁶ Ibid.

⁴⁷ Israel and Palestine Liberation Organization, "Declaration Of Principles On Interim Self-Government Arrangements," Article 3(b).

⁴⁸ Ibid., Annex 1(1); Israel and Palestine Liberation Organization, "Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip," Article II (3).

⁴⁹ Israel and Palestine Liberation Organization, "Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip," Article XVII (1)(a).

⁵⁰ A number of Palestinians (almost 150,000) actually returned to the OPT within the Oslo framework as part of the returning PLO officials. Nonetheless, the overwhelming majority of the refugees and displaced persons has not been allowed to return yet. Tamari, *Palestinian Refugees, Displaced Persons, and the Negotiating Strategy*, 2.

In fact, as explained in Chapter 3, displacement became much more active in some of its forms after the peace process started. For example, in Jerusalem more than 13,000 Jerusalem residencies have been revoked between 1967 and 2011, 11,000 of which were actually revoked after the peace process started.⁵¹ Similarly, the laws regulating child registration and family unification in Jerusalem, and the whole policy of “freezing the population registry” came with the peace process. It was noted by several observers and analysts that Israel’s policy towards the peace process was to use it to buy time, not to actually reach peace.⁵² Former Israeli Member of Knesset (parliament), Minister of Education and Minister of Environment Yossi Sarid ironically commented on this pattern:

Each one loves to take but hates to give, becomes addicted to talks on condition that there won't be any results, plants the trees of life yet loathes the fruit of knowledge. This is how it goes. We set a table with the Palestinian side - Palestine first - because the Palestinian problem is "the heart of the conflict," as we all know. On the path to an agreement, we turn over every stone. This too is common knowledge.⁵³

Also, Israeli sociologist Jessica Nevo more critically commenting on the role of the peace process wrote:

A more critical approach might argue that hidden real agenda of all peace agreements between Israel and the Palestinians, from the Oslo agreements of the 1990s to the 2003 Road Map, is to set up an apartheid system in the West Bank based on the creation of territorial Bantustans, the relocation of the Palestinian population, land confiscation and a segregated economy.⁵⁴

Indeed, Nevo’s observation is accurate. The accelerated Israeli colonization of the Occupied Territory combined with further innovation in displacement methods show that Israel is using the Palestinian “self-government” as a method to concentrate the Palestinian population and colonize the rest of the land.

⁵¹ B’Tselem, “Statistics on Revocation of Residency in East Jerusalem,” *B’Tselem*, December 3, 2012, http://www.btselem.org/jerusalem/revocation_statistics.

⁵² Yossi Sarid, “They’ve All Been Yitzhak Shamir,” *Haaretz.com*, November 28, 2008, <http://www.haaretz.com/print-edition/opinion/they-ve-all-been-yitzhak-shamir-1.258428>; Daniel Levy, “What Netanyahu Learned from Shamir (and Others Didn’t),” *Foreign Policy Blogs*, July 9, 2012, http://mideast.foreignpolicy.com/posts/2012/07/06/what_netanyahu_learned_from_shamir.

⁵³ Sarid, “They’ve All Been Yitzhak Shamir.”

⁵⁴ Jessica Nevo, “Transitional Justice and Its Application to the Zionist/ Palestinian Conflict and the Palestinian Refugee Issue,” in *Rights in Principle- Rights in Practice: Revisiting the Role of International Law in Crafting Durable Solutions for Palestinian Refugees*, ed. Terry Rempel (Beithlehem: Badil, 2009), 330.

While this was the practical implication of the process, it is important to stress that there is a serious problem even within the theoretical aspects of the peace process framework. First, it did not make any reference to many other types of victims of displacement. For example, no mention of those who were internally displaced in Israel, the West Bank or Gaza strip throughout the conflict can be found, creating a high level of frustration among the victims of these displacements.⁵⁵ Secondly, even with the types of displacement that the peace process tackled (i.e. 1967 refugees and West Bank and Gaza status revocation victims), there is no mention of a comprehensive remedy program that can redress the injustice that those displaced endured for many years. The use of neutral terms like the “admission” of “displaced persons” and the “reissuance of ID cards” for those who “lost” them is consistent with Israel’s general policy of denial. Finally, in relation to the *Nakba* of 1948, the peace process seems to be leading to a denial of the most important remedy that has become part of the identity of the refugees: the right to return. In addition, no special representation of the refugees has been appointed to advance their cause in the negotiations, leaving their rights and interests even more vulnerable.⁵⁶ Furthermore, within the peace process framework, issues like truth, accountability of the perpetrators of gross human rights violations, and reparations for the victims have not been addressed.

The Palestinians’ frustration with the “peace process” is well known and is well reported.⁵⁷ It was expressed with anger by the Palestinian hip-hop band DAM in their song “Who is the terrorist” where they chant:

You have taken everything I own in my land,

⁵⁵ Arafet Boujemaa and Palestinian Return Centre, *Internally Displaced Palestinians: “The Present Absentees”* (London: Palestinian Return Centre, 2010), 70–1.

⁵⁶ Susan M. Akram, “Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution,” *Journal of Palestine Studies* 31, no. 3 (2002): 46.

⁵⁷ Oxford University organized a good documentation regarding the opinions/ feelings of Palestinian refugees in the diaspora regarding several issues linked with their plight or the general political representation of the Palestinian people. Reading through the statements made by the refugees who participated in the study one can see how the issue of the right to return is still a steady demand. Moreover, a general frustration from the peace process, and a fear from what it could result in can be clearly sensed. See, Karma Nabulsi, *Palestinians Register: Laying Foundations and Setting Directions: Report of the Civitas Project* (Oxford: Nuffield College, University of Oxford, 2006), 47–9.

Why am I a terrorist? Because I'm not indifferent?
I'm hot-headed because I walk with my head up high
Trying to defend my land? They killed my loved ones
Now I'm alone, my family was dispersed
But I'll keep on crying out loud
I'm not against peace, peace is against me
It wants to eliminate me, to erase my heritage.⁵⁸

DAM's feeling that peace is against the Palestinians stems from the consequences of the peace process that creates a fear that "peace" is going to eliminate Palestinians and erase their heritage. Not only has the peace process failed to redress the victims of the past violations, but Israel has used it to accelerate displacement and create new injustices.

Against this background, a reassessment of the appropriate remedies that should be combined with the transition to peace is needed. While this chapter is designed to conduct this assessment in accordance with the transitional justice framework, it is essential to explain first the general international legal framework for providing remedies in international law. This will be briefly examined in the following section.

5.2 The Consequences of Failure to meet International Legal Obligations in International Law

It was argued in Chapter 4 that the policy of forced displacement that Israel has methodologically followed since 1948 until the current day was contrary to international law. By implementing this policy, Israel failed to meet its international legal obligations according to several branches of international law. First of all, Israel's acts of forced displacement of Palestinians are considered war crimes or crimes against humanity, depending on the circumstances of each incident. Secondly, Israel's failure to recognize the right of those it displaced from acquiring its citizenship was contrary to the customary law of state succession, and the law of nationality. Similarly, when Israel refrained from recognizing the right of the inhabitants of the OPT to reside therein it violated the rights

⁵⁸ DAM Hip Hop Band, "Song Lyrics Official Translation: Who's the Terrorist? (Meen Irhabi?)," *DAM Official Website*, accessed February 10, 2013, <http://www.damrap.com/album/whos-terrorist-%D9%85%D9%8A%D9%86-%D8%A5%D8%B1%D9%87%D8%A7%D8%A8%D9%8A/116>.

under IHL. Finally, when Israel prevented refugees from entering their own country it violated their human rights, as well as the rights of the states that were affected by having to host those displaced from their homes.

As will be explained in the following sections, any failure of a state to meet its international legal obligations has consequences in international law. The basic level of these consequences is an obligation upon the state which violated any obligation in international law to provide remedies to mend the harm it caused by its breach. These remedies are organized by the law of state responsibility. Simultaneously, if the violation is an international crime, such as war crimes and crimes against humanity, an additional level of consequences is invoked, namely, individual criminal responsibility. Since, as argued above, Israel's forced displacements of the Palestinian population are war crimes and/or crimes against humanity as well as violations of other bodies of international law, the two types of responsibility are applicable.

This section will define the international legal framework for redressing Israel's forced displacement of Palestinians since 1948. It will do so by first examining the law of state responsibility as well as individual criminal responsibility and their meaning in relation to displacement.

5.2.1 State Responsibility

Any failure of a state to meet an international legal obligation results in a duty to repair the harm caused by this obligation according to the law of state responsibility. This law is an old and traditional part of international law⁵⁹ which has been finally codified in 2001 by the International Law Commission (ILC) expressing long standing principles and

⁵⁹ Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2006), 50, <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199207534.001.0001/acprof-9780199207534>; "The Responsibility of States," in *General Course on Principles of International Law*, vol. 121, Collected Course of the Hague Academy of International Law (Martinus Nijhoff Publishers, 1967), 473, http://www.nijhoffonline.nl/view_pdf?id=er121_er121_323-619-58; Beatrice I. Bonafe, *The Relationship Between State and Individual Responsibility for International Crimes* (Martinus Nijhoff Publishers / Brill Academic, 2009), 35–41; Edith Brown Weiss, "Invoking State Responsibility in the Twenty-First Century," *The American Journal of International Law* 96, no. 4 (October 1, 2002): 798; Mark Gibney, Katarina Tomasevski, and Jens Vedsted-Hansen, "Transnational State Responsibility for Violations of Human Rights," *Harvard Human Rights Journal* 12 (1999): 267; Christian Tomuschat, "Reparation for Victims of Grave Human Rights Violations," *Tulane Journal of International and Comparative Law* 10 (2002): 158.

developing some further.⁶⁰ Indeed, as will be shown below, this law has gained recognition since the first half of the twentieth century.

As early as 1928, an important and widely cited judgment of the Permanent Court of International Justice known as the *Chorzow* factory case was decided, ruling in favour of Germany in its claims for reparations resulting from Poland's expropriation of a German factory.⁶¹ The court applied the principle of state responsibility that it saw was the direct result of a state's failure to meet its international legal obligations. The court in its judgment expressed that it was using an existing international legal principle. It stated:

It is a principle of international law, and even a general conception of law, that any breach of an engagement invokes an obligation to make reparation... [R]eparation is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.⁶²

The court further explained that when a wrongful act has been conducted by a state, the expected outcome of the reparations is to reverse the harm caused by the illegal act. It stated:

The essential principle contained in the actual notion of an illegal act- a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals- is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.⁶³

The court clarified the types of reparation that need to be provided upon failure to abide by international legal obligations and further provided that there is a hierarchy of remedies, whereas restitution is higher than other forms of reparation. It provided explaining this hierarchy that the remedies should include:

Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not have covered by restitution in kind or

⁶⁰ International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts" (Supplement No. 10 (A/56/10), chp.IV.E.1, November 2001); International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries" (Yearbook of the International Law Commission, Col. II, part Two, 2001), (A/65/10).

⁶¹ Case Concerning the Factory at Chorzow (Ser A.), No. 17 (Permanent Court of International Justice 1928).

⁶² Ibid., 29.

⁶³ Ibid., 47.

payment in place of it- such are the principles which would serve to determine the amount of compensation due for an act contrary to international law.⁶⁴

The term “reparation” used in this judgment does not only mean monetary compensation. The concept of reparation here means to “wipe out all consequences of the illegal act” which, as explained by Dinah Shelton, “refers to the entire range of remedies available for a breach of an international obligation.”⁶⁵

One important aspect of this judgment was its reference to repairing harm caused by failure to adhere with an international legal principle was as a “general conception of law.”⁶⁶ Indeed, it is a well-established principle in domestic laws that reparation is an obligation that follows any violation of the law that causes harm. In Shelton’s words, this type of obligation in international law “mirrors that of national remedies: to make good the injury caused to persons or property by a wrongful act.”⁶⁷

The International Court of Justice (ICJ) clarified that reparations in their meaning in the *Chorzow factory* case also apply to individuals, not only to states.⁶⁸ It stated, while advising on the legal parameters of the tribunal’s judgment on reparations to an individual that:

... the Tribunal possesses a wide margin of discretion within the broad principle that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.⁶⁹

These principles are implementable not only in a state’s wrongdoing towards alien citizens of other states, but also towards its own citizens and other people under its jurisdiction especially if this wrongdoing is a violation of human rights law or IHL. Most of the instruments of human rights law and IHL provide that a state has a legal obligation to

⁶⁴ Ibid.

⁶⁵ Shelton, *Remedies in International Human Rights Law*, 50.

⁶⁶ Case Concerning the Factory at Chorzow (Ser A.), No. 17, 29 (Permanent Court of International Justice 1928), 29.

⁶⁷ Shelton, *Remedies in International Human Rights Law*, 51.

⁶⁸ Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, ICJ Reports 1973 166, 197 (ICJ 1973).

⁶⁹ Ibid.

provide remedies⁷⁰ for the victims of human rights violations. The Universal Declaration on Human Rights stated in 1948 that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”⁷¹ Similarly, the International Covenant on Civil and Political Rights demanded from each state party to the covenant to ensure providing “effective remedies”⁷² to the victims, and to develop a system of state institutions to provide these remedies.⁷³ The same obligation was required by the International Covenant on the Elimination of All Forms of Racial Discrimination, which required from each state party to the convention to guarantee “effective protection and remedies.”⁷⁴ It further provided that parties to the convention should establish institutions and tribunals that give “adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”⁷⁵ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provided a similar obligation to redress the victims of torture through compensation to them or to their dependants if they died as a result of torture.⁷⁶ The Convention on the Rights of the Child stated in Article 35 that “States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration” for victims.⁷⁷

⁷⁰ As noted by Buyse, remedies have a double meaning. On the one hand it refers to the principle of Access to Justice, which is the readiness of the legal system to receive claims from individuals that will be independently examined and potentially redressed. On the other hand, a remedy can be the actual measure taken to redress a violation of one’s rights, which includes restitution, compensation and satisfaction. See, A. C. Buyse, “Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law,” *Heidelberg Journal of International Law* 68 (2008): 129; See also, Tomuschat, “Reparation for Victims of Grave Human Rights Violations,” 168.

⁷¹ “The Universal Declaration of Human Rights” (G.A. Res. 217A (III), U.N. Doc. A/810, at 71, 1948), <http://www.un.org/en/documents/udhr/index.shtml>, Article 8.

⁷² UN General Assembly, “International Covenant on Civil and Political Rights” (adopted Dec. 19, 1966, 999 U.N.T.S. 171, 1966), <http://www2.ohchr.org/english/law/ccpr.htm>, Article 2(3)(a).

⁷³ *Ibid.*, Article 2(3)(b) and (c).

⁷⁴ UN General Assembly, “International Convention on the Elimination of All Forms of Racial Discrimination,” December 21, 1965, United Nations, Treaty Series, vol. 660, p. 195, <http://www2.ohchr.org/english/law/cerd.htm>, Article 6.

⁷⁵ *Ibid.*

⁷⁶ UN General Assembly, “Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” December 10, 1984, United Nations, Treaty Series, vol. 1465, p. 85, Article 14.

⁷⁷ UN General Assembly, “Convention on the Rights of the Child,” November 20, 1989, United Nations, Treaty Series, vol. 1577, p. 3, Article 35.

In addition, the responsibility of a state to repair the harm caused by its failure to abide by IHL obligations was codified as early as 1907. The Hague Regulations of 1907 stated that:

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.⁷⁸

The first additional protocol to the Geneva Conventions stated the same provision.⁷⁹ In addition, the Rome Statute gave the ICC a jurisdiction to provide “reparations” to the victims including “restitution, compensation and rehabilitation.”⁸⁰

These provisions in global instruments have their equivalent in regional human rights treaties.⁸¹ What can be concluded from the consistent provision for an obligation to redress victims of human rights violation is that this “right to a remedy” is an integral part of human rights law and IHL.⁸² In 2005, the UN General Assembly issued a resolution, following recommendation from the UN Commission on Human Rights⁸³ and the UN Economic and Social Council (ECOSOC),⁸⁴ which adopted basic principles and guidelines on

⁷⁸ “Convention Respecting the Laws and Customs of War on Land” (Hague, October 18, 1907), Article 3.

⁷⁹ International Committee of the Red Cross (ICRC), “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I),” June 8, 1977, Article 91.

⁸⁰ UN General Assembly, “Rome Statute of the International Criminal Court (last Amended 2010)” (ISBN No. 92-9227-227-6, July 17, 1998), Article 75.

⁸¹ Organization of American States, “American Convention on Human Rights, ‘Pact of San Jose’” (Costa Rica, November 22, 1969), Article 25; Council of Europe, “European Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols Nos. 11 and 14,” November 4, 1950, ETS 5, Article 13; Organization of African Unity, “African Charter on Human and Peoples’ Rights,” June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) The African Charter on Human and Peoples’ Rights does not incorporate a provision recognizing a “right to a remedy” per se. Nonetheless, it provides in Article 21 that there is a right to restitution of property and compensation. Furthermore, it provides that a special commission would investigate alleged human rights violations in any African country once remedies have been exhausted. (Article 50).

⁸² Shelton, *Remedies in International Human Rights Law*, 173; Marco Sassòli, “State Responsibility for Violations of International Humanitarian Law,” *International Review of the Red Cross* 84, no. 846 (2002): 405–6.

⁸³ UN Commission on Human Rights, “Resolution 2005/35 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” April 19, 2005, U.N. Doc. E/CN.4/RES/2005/35.

⁸⁴ UN Economic and Social Council (ECOSOC), “UN Economic and Social Council Resolution 2005/30: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,” July 25, 2005, U.N. Doc. E/RES/2005/30.

the right to a remedy following gross violations of human rights law and IHL.⁸⁵ The principles adopted by these three UN institutions reaffirmed that the domestic legal systems of states should abide by international law through adopting a number of measures which includes: “Making available adequate, effective, prompt and appropriate remedies, including reparation.”⁸⁶

Moreover, Not only has international law provided a right to a remedy for human rights violations, but it even considered providing these remedies as an interest to the whole international community. This was confirmed in the *Barcelona Traction* judgment by the ICJ.⁸⁷ The court stated:

...an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*.⁸⁸

With this judgment, the court emphasised that certain types of international law obligations are the concern of the whole international community. The court went further in explaining which types of obligations have the status of “*erga omnes*,” by stating:

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.⁸⁹

Thus, the ICJ confirmed a special protection for human rights by declaring that the whole international community has an interest that a state would not breach the “rules concerning the basic rights of the human person.”⁹⁰

All the principles presented above were confirmed again when the International Law Commission (ILC) finalized its process of codifying the law of state responsibility in

⁸⁵ UN General Assembly, “Resolution 60/147,” 16 December 2005, U.N. Doc. A/RES/60/147.

⁸⁶ Ibid.

⁸⁷ *Barcelona Traction, Light and Power Company, Limited, Judgment*, ICJ Reports 1970 3 (1970).

⁸⁸ Ibid., 32.

⁸⁹ Ibid.

⁹⁰ Ibid.

2001,⁹¹ which was commended “to the attention of Governments” in a resolution by the UN General Assembly “without prejudice to their [i.e. the articles’] future adoption or other appropriate action.”⁹² Article 1 of the Articles states:

Every internationally wrongful act of a state entails the international responsibility of that state.⁹³

The criteria for deciding whether an act is lawful or not is dependent on international law; and as a result, a state cannot benefit from an argument that its failure to meet an international legal obligation is due to the fact that an act is lawful in its own laws.⁹⁴ When it has been established that a state has failed to meet one of its international legal obligations, the first and most important remedy is “to cease the act” and “offer appropriate assurances and guarantees of non-repetition.”⁹⁵ Then, a state is under an obligation to offer “reparation” for both material and moral harm.⁹⁶ Due to the same historical hierarchy mentioned above, such reparation must take the form of (1) Restitution,⁹⁷ defined as the state’s obligation to “re-establish the situation which existed before the wrongful act was committed”⁹⁸ unless impossible or involves a “burden out of

⁹¹ International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts.”

⁹² UN General Assembly, “Resolution 56/83,” 12 December 2001, UN Doc. A/RES/56/83.

⁹³ International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts,” Article 1.

⁹⁴ Ibid., Article 3 & 32.

⁹⁵ Ibid., Article 30.

⁹⁶ Ibid., Article 31.

⁹⁷ Regarding the question of prioritizing Restitution over compensation, the International Law Commission and the International Law Association (non-governmental body that researches certain questions of international law and advises certain bodies of the UN) wrote that some level of flexibility should be taken into consideration while considering restitution as the preferred remedy. This flexibility can be translated to giving a choice to the injured state to choose a preferred reparation modality. However, as a matter of principle, restitution is the preferred form of “wiping out” the injury caused by the breach of international law. See, International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries,” 96; International Law Association (ILA) and Peter Malanczuk, *First Report of the International Law Association (ILA) Study Group on the Law of State Responsibility* (The Hague: ILA, June 8, 2000), para. 20–1.

⁹⁸ The commentary of the Articles explains that the ILC adopted the narrower definition of restitution, which is re-establishing the status quo ante. Any additional claims would be considered under the second reparation, namely compensation. International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries,” 96.

all proportion;”⁹⁹ (2) compensation for damages “not made good by restitution,”¹⁰⁰ which includes the loss of profits;¹⁰¹ and (3) satisfaction which “may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.”¹⁰²

According to the ILC Articles, state responsibility can be invoked against a state when it fails to meet its international legal obligations;¹⁰³ and a similar provision is also included in human rights and IHL instruments, which stress the need for a remedy once the obligation to protect a right is breached.¹⁰⁴ In the case of human rights violations, any

⁹⁹ International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts,” Article 35.

¹⁰⁰ The commentary explained that “[r]estitution, despite its primacy as a matter of legal principle, is frequently unavailable or inadequate.” For this reason, compensation comes to complement the redress by redressing injuries that were not redressed by restitution. See, International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries,” 99.

¹⁰¹ International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts,” Article 36; Byse asserts that compensation does not only include monetary, but can also include other types such as giving alternative housing to a person whose house was demolished. See, Buyse, “Lost and Regained?,” 131.

¹⁰² International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts,” Article 37.

¹⁰³ Article 2 of ILC Articles defines an internationally wrongful act as a “conduct consisting of an action or omission” which is “attributable to a state under international law; and consists of a breach of an international obligation of the state.” See, International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts”, Article 2.

¹⁰⁴ For example, Article 2 of the ICCPR declared that the right to a remedy is an entitlement to “any person whose rights or freedoms as herein recognized are violated.” UN General Assembly, “International Covenant on Civil and Political Rights”; The International Convention on the Elimination of all forms of Racial Discrimination provided in Article 6 that a remedy should be available following acts of racial discrimination which “violate his human rights and fundamental freedoms contrary to this Convention.” UN General Assembly, “International Convention on the Elimination of All Forms of Racial Discrimination”; In the Convention against Torture declared that the right to compensation should be given to “victims” of torture. UN General Assembly, “Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”; The Convention of the Rights of the Child determines that redress shall be given to a child “victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts.” UN General Assembly, “Convention on the Rights of the Child”; Article 3 of The Hague Convention of 1907 and Article 91 of the Additional Protocol I of the Geneva Conventions provided that “A belligerent party which violates the provisions of the said Regulations” is liable to pay compensation. “Hague Convention of 1907”; International Committee of the Red Cross (ICRC), “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)”; The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the UN General Assembly in 2005 stated that “a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a

state in the world is entitled to invoke state responsibility, because of the nature of this breach of international law. Article 48 of the ILC Articles states:

Any State other than an injured State is entitled to invoke the responsibility of another state... if ...(b) the obligation breached is owed to the international community as a whole.¹⁰⁵

In explaining this provision, the official commentary on the ILC draft articles refers to the *Barcelona Traction* case saying that this provision “intends to give effect to the statement by the ICJ” quoted above.¹⁰⁶ The commentary further explains:

All states are by definition members of the international community as a whole, and the obligations in question are by definition collective obligations protecting interests of the international community as such.¹⁰⁷

Not only does any state have the right to invoke such responsibility, but also the international community has an obligation to “cooperate to bring to an end through lawful means”¹⁰⁸ serious breaches of obligation “under peremptory norms of general international law.”¹⁰⁹ A breach is seen as serious if it involves a “gross or systematic failure by the responsible State to fulfil the obligation.”¹¹⁰ Furthermore, any situation created by such breach shall not be recognized or assisted by other states.¹¹¹ The commentary gave the following examples to “gross violations:” aggression, slavery, slave trade, genocide, racial discrimination, apartheid, torture and degrading treatment and non-respect to the right to self-determination.¹¹² A “systematic” violation is one that is “carried out in an

victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.” UN General Assembly, “Resolution 60/147,” 16 December 2005, Article 15; UN Economic and Social Council (ECOSOC), “UN Economic and Social Council Resolution 2005/30: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”; UN Commission on Human Rights, “Resolution 2005/35,” 19 April 2005.

¹⁰⁵ International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts”, Article 48.

¹⁰⁶ International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries,” 127.

¹⁰⁷ Ibid.

¹⁰⁸ International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts,” Article 41 (1).

¹⁰⁹ Ibid., Article 40 (1).

¹¹⁰ Ibid., Article 40(2).

¹¹¹ Ibid., Article 41(2).

¹¹² International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries,” 112–3; It might be worth mentioning here that the ILA report also

organized and deliberate way,” which can be known through the “intent to violate the norm; the scope and the number of individual violations; and the gravity of their consequences for the victims.”¹¹³ Of course, a violation can be both gross and systematic, as both are not mutually exclusive.

The obligation of other states to refrain from recognizing gross or systematic violations of human rights was confirmed by the ICJ in its advisory opinion about the legality of the wall which Israel constructed in the West Bank.¹¹⁴ After the court arrived to the conclusion that the wall was illegal¹¹⁵ and demonstrated that Israel was under an obligation to reverse this unlawful conduct,¹¹⁶ it stated that the international community has an obligation in relation to Israel’s violation of certain *erga omnes* obligations.¹¹⁷ These obligations included the right to self-determination¹¹⁸ and Israel’s duty to abide by the principles of IHL, especially the GCIV.¹¹⁹ In conclusion, the court declared that Israel’s breach of *erga omnes* obligations must be faced by a duty “not to recognize the illegal situation resulting from the construction of the wall,”¹²⁰ and “not to render aid or assistance in maintaining the situation created by such construction.”¹²¹ Furthermore, the court stated that all states have an obligation to “see to it that any impediment, resulting from the construction of the wall, to the exercise of the Palestinian people of its right to self-determination is brought to an end.”¹²² In addition, it further stressed that all states parties to the GCIV are “under the obligation,... to ensure compliance by Israel with

included breaches of environmental law as being of concern to the whole international community. International Law Association (ILA) and Malanczuk, *First Report of the International Law Association (ILA) Study Group on the Law of State Responsibility*, para. 109.

¹¹³ International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries,” 113.

¹¹⁴ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (ICJ Advisory Opinion 2004).

¹¹⁵ *Ibid.*, paras. 114–137.

¹¹⁶ *Ibid.*, paras. 147–153. The ICJ explicitly referred to “state responsibility” principles as the basis of Israel’s obligation to stop the unlawful conduct and provide restitution and compensation to the victims.

¹¹⁷ *Ibid.*, para. 155.

¹¹⁸ *Ibid.*, para. 156.

¹¹⁹ *Ibid.*, paras. 157–8. The Court explained that the GCIV states in Article 1 that parties to the convention have an obligation to “ensure respect” for the convention “under all circumstances.”

¹²⁰ *Ibid.*, para. 159.

¹²¹ *Ibid.*

¹²² *Ibid.*

international humanitarian law as embodied in that convention.”¹²³ Finally, the court saw that the UN General Assembly and Security Council should “consider what further action is required to bring an end to the illegal situation...”¹²⁴ These provisions in the advisory opinion confirmed that international law provided special protection to human rights by considering the whole international community not only entitled to invoke state responsibility when a state breaches its duties, but also obliged not to recognize the unlawful consequences of the illegal conduct.

Finally, state responsibility does not prejudice individual criminal responsibility for perpetrators of international crimes but rather complements it.¹²⁵ This was explicitly mentioned by the ILC Articles in Article 58 which stated:

These Articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a state.¹²⁶

In explaining this article, the ILC commentary refers to such responsibility that is invoked in the aftermath of committing a war crime or a crime against humanity.¹²⁷ This type of responsibility will be explained in the following section. However, it might be important to end this section by stressing the conclusion that when it comes to grave and systematic violations of human rights, or violations of IHL, international law has given a special protection by allowing the whole international community to invoke state responsibility. The other special protection that developed in international law is the

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ While usually in gross violations of human rights both levels of responsibility are invokable, Bonafe asserts that there is a separation between state and individual responsibility for international crimes. Nonetheless, there are some points where they cross. Bonafe, *The Relationship Between State and Individual Responsibility for International Crimes*, 221–4; Trap argues that the relationship between state responsibility and individual criminal responsibility is “dynamic,” in the sense that once criminal responsibility is determined, the victim state can be catalysed into “formally invoking a wrongdoing state’s responsibility.” Kimberley N. Trapp, *State Responsibility for International Terrorism* (Oxford University Press, 2011), 231, <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199592999.001.0001/acprof-9780199592999?rskey=hcrA5g&result=2&q=state%20responsibility>.

¹²⁶ International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts,” Article 58.

¹²⁷ International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries,” 142–3.

obligation to punish those who are responsible for these violations, as will be shown below.¹²⁸

5.2.2 Individual Criminal Responsibility

While any wrongful act invokes state responsibility to repair the harm caused by the breach of international law, a much more limited number of wrongful acts result in individual criminal responsibility, and as a result an obligation to prosecute persons who are responsible of the breach. This section will briefly discuss this potential consequence.

The modern concept of individual criminal responsibility rose as a principle in the aftermath of the First World War, when the victorious powers of the war sought to prosecute persons serving the defeated powers accused of starting the war or committing “war crimes” or “crimes against the law of humanity.”¹²⁹ Nonetheless, political

¹²⁸ In the Basic Principles and Guidelines on the Right to Remedy adopted in 2005 by the UN General Assembly, the UN Economic and Social Council and the UN Commission on Human Rights both it was recognized that criminal responsibility and state responsibility should be invoked in the case of gross violations of human rights. Article 4 of the principles made reference to the obligation to prosecute perpetrators, and articles 11-25 discuss the obligation to provide remedies to victims. See. UN General Assembly, “Resolution 60/147,” 16 December 2005; UN Commission on Human Rights, “Resolution 2005/35,” 19 April 2005; UN Economic and Social Council (ECOSOC), “UN Economic and Social Council Resolution 2005/30: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.”

¹²⁹ The contemporary principle of individual criminal responsibility started developing in the aftermath of the First World War. In 1919, the victorious powers set up a special commission which recommended the punishment of those responsible for “outrages against the laws and customs of war and the laws of humanity.” This report argued that also heads of state must be brought to trial and punishment, regardless of their immunity status. See, Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, “Report Presented to the Preliminary Peace Conference,” *The American Journal of International Law* (1920) 14, no. 1/2 (March 29, 1919): 116; Based on these recommendations, the peace treaties that ended the war included provisions on criminal prosecution of those accused of crimes linked to the war. Articles 227-230 of the Treaty of Versailles between Germany and the Allied forces provided for the prosecution of the German Emperor for “supreme offences against international morality and the sanctity of treaties.” Moreover, Article 228 gave the Allies the right to prosecute “persons accused of having committed acts in violation of the laws and customs of war.” See, “Treaty of Versailles: Treaty of Peace Between the Allied and Associated Powers and Germany” (Versailles, June 28, 1919), Articles 227-230. Similarly, according to the Treaty of Sevres between Turkey and the Allies, the Allies were entitled prosecute “persons accused of having committed acts in violation of the laws and customs of war.” See, “Treaty of Peace Between the Allied Powers and Turkey (Treaty of Sevres),” August 10, 1920, reprinted in 15 Am. J. Int’l L., (1921), pp. 179-181, <http://www.jstor.org/stable/2212728>, Article 226. This treaty was never ratified by Turkey, and it was replaced by the Treaty of Lausanne in which there was no reference to prosecutions. ; See, “Lausanne Peace Treaty,” July 24, 1923, published at the Turkish Ministry of Foreign Affairs website, <http://www.mfa.gov.tr/lausanne-peace-treaty.en.mfa>.

developments then prevented the practical implementation of this idea.¹³⁰ The first practice of such prosecutions was shaped by the International Military Tribunals in Nuremburg¹³¹ and Tokyo¹³² in the aftermath of the atrocities committed during the Second World War.¹³³ These tribunals introduced significant developments to existing legal concepts and principles and defined for the first time the parameters of individual criminal responsibility for war crimes, “crimes against humanity,”¹³⁴ and the “crimes against peace.”¹³⁵ By bringing the principles that were introduced in 1919 into practice in the late 1940s, as Bassiouni asserts, the two tribunals demonstrated that these principles were “ripe” as customary international legal principles.¹³⁶ After Nuremburg and Tokyo, it became clear that any person responsible for war crimes or crimes against humanity was not immune to prosecution, including heads of states.¹³⁷

¹³⁰ The treaty of Sevres was not ratified by Turkey. This treaty was exchanged with the Treaty of Lausanne which gave amnesties to those who had been accused of crimes linked to the war. See, M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, 2011), xxx; Similarly, the German emperor was not prosecuted for political reasons. He was granted asylum in the Netherlands who refused to extradite him. Benjamin Ferencz, “From Nuremburg to Rome: a Personal Account,” in *Justice for Crimes Against Humanity*, ed. Mark Lattimer and Philippe Sands (Hart Publishing, 2003), 31; See also, Gloria J. Browne-Marshall, “Treaties and International Law,” in *International Crime and Justice*, ed. Mangai Natarajan (Cambridge University Press, 2010), 343; William Schabas, *An Introduction to the International Criminal Court*, 2nd ed. (Cambridge University Press, 2004), 3; Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Springer, 2008), 94–7; Ilias Bantekas and Susan Nash, *International Criminal Law*, 2nd ed. (Cavendish Publishing, 2003), 325–6.

¹³¹ The International Military Tribunal in Nuremburg was established by an agreement between the victors of the war known as the London Agreement. See, United Nations, “Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis” (London, August 8, 1945).

¹³² The International Military Tribunal in the Tokyo was established by a military proclamation. See, Supreme Commander of the Allied Powers, “Charter of the International Military Tribunal for the Far East,” January 19, 1946.

¹³³ Cryer describes the creation of the Nuremburg IMT as “extraordinary” because it was the first “international criminal tribunal applying international law directly.” Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, 2005), 39.

¹³⁴ “Crimes against humanity” replaced the concept of “crimes against the law of humanity” mentioned above. The development of the concept of crimes against humanity was explained in Chapter 4 above.

¹³⁵ Bantekas and Nash, *International Criminal Law*, 327; Cryer, *Prosecuting International Crimes*, 39; Damgaard, *Individual Criminal Responsibility for Core International Crimes*, 98–105; Schabas, *An Introduction to the International Criminal Court*, 5–8.

¹³⁶ Bassiouni, *Crimes Against Humanity*, xxxi.

¹³⁷ Elies Van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press, 2012), 4,

The charter of the Nuremberg Tribunals explicitly expressed that those who were responsible for specific crimes were individually responsible for their crimes. It stated:

The Tribunal established... for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility...¹³⁸

The London Charter laid out some additional important principles. First, no one was to be exempted from prosecution because of his position, including heads of states and officials in government departments.¹³⁹ In addition, one cannot be exempted from responsibility for the sole reason that he was instructed to commit a criminal act from a superior.¹⁴⁰ Indeed, the principles on individual criminal responsibility laid down in the London Charter were followed in all the *ad hoc* tribunals, as well as the charter of the International Criminal Court (ICC).¹⁴¹ Since the Second World War, international law has progressively developed toward including a duty to prosecute those accused of gross human rights violations amounting to crimes.¹⁴²

<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199560363.001.0001/acprof-9780199560363>.

¹³⁸ United Nations, "London Charter", Article 6.

¹³⁹ *Ibid.*, Article 7.

¹⁴⁰ *Ibid.*, Article 8.

¹⁴¹ UN General Assembly, "Rome Statute of the International Criminal Court", Article 25 sets the parameters of individual criminal responsibility; Article 26 excludes from jurisdiction anyone who committed an international crime while under the age of 18; Article 27 states that one cannot be excused by committing his crime in official capacity, and cannot benefit from his immunity; and Article 28 confirms the jurisdiction over commanders and other superiors who failed to stop crimes under certain conditions. ; UN Security Council, "Statute of the International Tribunal for the Prosecution of the Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991" (UN Doc S/25704 at 23, Annex (1993) and S/25704/Add.1, Adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827, 1993), Articles 7–8; UN Security Council, "Statute of the International Tribunal for Rwanda" (Adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600, 1994), Articles 5–6; UN Security Council, "Statute of the Special Court for Sierra Leone" (Adopted by S.C. Res. 1315, 2000), Article 6.

¹⁴² According to Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Article 4 states that when an international crime is committed "States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him." See, UN Economic and Social Council (ECOSOC), "UN Economic and Social Council Resolution 2005/30: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human

In the same way that the law of state responsibility does not prejudice any individual responsibility for international crimes, the opposite is also true. The ICC statute explicitly confirms by stating that individual criminal responsibility shall not “affect the responsibility of states under international law.”¹⁴³ This principle was clarified through an ICJ decision related to the question of whether Serbia and Montenegro as a state bore any responsibility for the crime of genocide that was committed in Bosnia and Herzegovina.¹⁴⁴ In explaining its decision and answering one of the arguments of the defendants, the court stated:

The court is mindful of the fact that the famous sentence in the Nuremberg Judgment that ‘[c]rimes against international law are committed by men, not by abstract entities...’ might be invoked in support of the proposition that only individuals can breach the obligations set out in Article III. But the Court notes that that tribunal was answering the argument that ‘international law is concerned with the actions of sovereign states, and provides no punishment for individuals’..., and that thus States also were responsible under international law. The Tribunal rejects that argument in the following terms: ‘[t]hat international law imposes duties and liabilities upon individuals as well as upon States has long been recognized’... The Court observes that that duality of responsibility continues to be a constant feature of international law. This feature is reflected in Article 25, paragraph 4, of the Rome Statute for the International Criminal Court, now accepted by 104 States: ‘No provision in this statute relating to individual criminal responsibility shall affect the responsibility of states under international law.’¹⁴⁵

Rights Law and Serious Violations of International Humanitarian Law”; UN Commission on Human Rights, “Resolution 2005/35,” 19 April 2005; UN General Assembly, “Resolution 60/147,” 16 December 2005; Goodwin Gill argues that the duty to prosecute perpetrators of genocide, war crimes or crimes against humanity is stronger than the duty not to return an asylum seeker in most cases. He argues that there are two routes a state can take in order to meet its international legal obligation: Either extradite the accused or prosecute him. See, Guy Goodwin-Gill, “Crime in International Law: Obligations Erga Omnes and the Duty to Prosecute,” in *The Reality of International Law Essays in Honour of Ian Brownlie*, ed. Guy Goodwin-Gill and Stefan Talmon (Oxford University Press, 1999), 220–1, <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198268376.001.0001/acprof-9780198268376>.

¹⁴³ UN General Assembly, “Rome Statute of the International Criminal Court,” Article 25(4).

¹⁴⁴ ICJ, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 43 (International Court of Justice 2007).

¹⁴⁵ *Ibid.*, paras. 172–3.

Thus, it is a well-established principle in international law that state responsibility and individual responsibility are not mutually exclusive and that they apply simultaneously if an international crime was committed and caused harm.¹⁴⁶

5.3 The Parameters of a Transitional Justice Framework in Addressing Displacement in the Palestinian-Israeli conflict

The mass displacements that Israel has been systematically conducting since the *Nakba* has not only been a violation of international law,¹⁴⁷ but also one of the core issues of the conflict. Because the peace process has not succeeded with solving the displacement problem yet,¹⁴⁸ the space for theoretical debates is open for suggesting solutions.

As shown in the literature review presented in Chapter 1, the debate on tackling the displacement problem is relatively new.¹⁴⁹ Until now, there has been no attempt to define the parameters of the policies following a transitional justice approach. This section will attempt to define these parameters in accordance with the general theories of transitional justice and the international experiences. It will do so by defining transitional justice, and then examining how its measures tackled displacement in other contexts, and applying these concepts on the Palestinian-Israeli context.

5.3.1 Defining Transitional Justice as a Conception and a Practice

Transitional justice refers to the framework of a wide range of measures that are used in a transitional period following a suppressive regime or a conflict to redress rights violations that had taken place prior to the transition.¹⁵⁰ Contributors to transitional

¹⁴⁶ Van Sliedregt, *Individual Criminal Responsibility in International Law*, 6–7; Bonafe, *The Relationship Between State and Individual Responsibility for International Crimes*, 23–5; Bantekas and Nash, *International Criminal Law*, 13; A. Day, “Crimes Against Humanity as a Nexus of Individual and State Responsibility: Why the ICJ Got Belgium V. Congo Wrong,” *Berkeley J. Int’l L.* 22 (2004): 504–8; Damgaard, *Individual Criminal Responsibility for Core International Crimes*, 111–2.

¹⁴⁷ See, Chapter 4

¹⁴⁸ See, sec. 5.1 above.

¹⁴⁹ See, Chapter 1, sec. 1.3 above.

¹⁵⁰ Ruti G. Teitel, “Transitional Justice in a New Era,” *Fordham International Law Journal* 26 (2003 2002): 893; Charles T. Call, “Is Transitional Justice Really Just,” *Brown Journal of World Affairs* 11 (2005 2004): 101; Alexandra Barahona De Brito, Carmen Gonzalez Enriquez, and Paloma Aguilar, *The Politics of Memory and Democratization: Transitional Justice in Democratizing Societies: Transitional Justice in*

justice literature have given it several definitions, stressing different aspects of its elements. A review of these definitions is useful to understanding transitional justice. The transitional justice theorist Ruti Teitel has defined it as:

[T]he conception of justice associated with periods of political change, characterized by legal responses to confront with wrongdoings of repressive predecessor regimes.¹⁵¹

Further to this, the International Centre for Transitional Justice (hereinafter ICTJ) adopts the following definition:

[T]he set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms.¹⁵²

In addition to these definitions, a report of the Secretary-General of the United Nations to the Security Council described transitional justice as:

The full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.¹⁵³

A combination of elements from all of these definitions provides a more comprehensive understanding of what transitional justice is and should entail, both in theoretical and practical terms. First of all, transitional justice is a "conception," as Teitel defines it, or in other words, a theoretical framework, characterized and composed by a number of goals and assumptions. The main goal of this framework is to address the injustices that took place during a conflict or a suppressive regime through "legal responses" and to advance peace through methods that focus on the promotion of a *comprehensive* conception of justice.¹⁵⁴ The major assumption is that societies going

Democratizing Societies (Oxford University Press, 2001), 1; Alex Boraine, "Transitional Justice," in *Pieces of the Puzzle: Keywords on Reconciliation & Transitional Justice*, ed. Charles Villa-Vicencio, Erik Doxtader, and Richard Goldstone (African Minds, 2004), 67.

¹⁵¹ Ruti G. Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003): 69.

¹⁵² International Center for Transitional Justice, "What Is Transitional Justice?," *ICTJ Website*, accessed December 18, 2012, <http://ictj.org/about/transitional-justice>.

¹⁵³ United Nations Security Council, "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies" (Report of the Secretary-General, S/2004/616, August 23, 2004), para. 8.

¹⁵⁴ Boraine, "Transitional Justice," 67–72; Peter R. Baehr, "How to Come to Terms with the Past," in *Atrocities and International Accountability: Beyond Transitional Justice*, ed. Edel Hughes, William Schabas,

through a transition from conflict or suppression to peace or democracy must pursue peace and justice simultaneously because peace is not durable without justice.¹⁵⁵ Although transitional justice scholars normally refer its practical beginning to the tribunals that took place after the atrocities of the Second World War,¹⁵⁶ this framework as an independent branch of scholarship has been developing as recently as the 1990s, exploring the relationship between peace and justice and debating the justice standards that need to be maintained when pursuing peace.¹⁵⁷

At the same time, the practical understanding of transitional justice is well represented in the ICTJ and UN definitions. It is a number of “measures” or “processes and mechanisms” that were advanced throughout the years by the practice of a large number of countries in an endeavour to address the injustices of the past.¹⁵⁸ These measures are either officially adopted by states and/or international organizations¹⁵⁹ or in some cases

and Ramesh Chandra Thakur (United Nations University Press, 2007), 7; Laurel E. Fletcher and Harvey M. Weinstein, “Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation,” *Human Rights Quarterly* 24, no. 3 (2002): 574–5; Wendy Lambourne, “Transitional Justice and Peacebuilding After Mass Violence,” *International Journal of Transitional Justice* 3, no. 1 (March 1, 2009): 28–9.

¹⁵⁵ In a video produced by the ICTJ to promote the idea that justice and peace should be sought together, the former South African president, a Nobel peace prize winner under whose government South Africa ended the era of Apartheid and implemented transitional justice, Nelson Mandela stated: “Justice reinforces peace and the long-term peace that one is looking for.” See, ICTJ, *Peace and Justice*, 2011, http://www.youtube.com/watch?v=PWFpngEfu84&feature=youtube_gdata_player; Furthermore, the UN officially adopts this assumption. See, United Nations Security Council, “The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies”; In addition, several transitional justice contributors have written confirming this concept. For example, see, Lambourne, “Transitional Justice and Peacebuilding After Mass Violence”; See also, Rama Mani, “Balancing Peace with Justice in the Aftermath of Violent Conflict,” *Development* 48, no. 3 (September 2005): 25–34; ICTJ, *Pursing Peace, Justice or Both?*, Fact Sheet, Focus: Peace and Justice (New York: International Center for Transitional Justice, April 25, 2009); Marieke Wierda, “Remarks by Marieke Wierda,” in *American Society of International Law Proceedings* (presented at the Peace v. Justice: Contradictory or Complementary, American Society of International Law, 2006), 369–370; Kai Ambos, “The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC,” in *Building a Future on Peace and Justice: Studies on Transitional Justice, Conflict Resolution and Development: The Nuremberg Declaration on Peace and Justice*, ed. Kai Ambos, Judith Large, and Marieke Wierda (Springer, 2009), 19.

¹⁵⁶ Teitel, “Transitional Justice Genealogy,” 72.

¹⁵⁷ Christine Bell, “Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’,” *International Journal of Transitional Justice* 3, no. 1 (March 1, 2009): 5–27.

¹⁵⁸ Ambos, “The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC,” 22; Naomi Roht-Arriaza, “The New Landscape of Transitional Justice,” in *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, ed. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge University Press, 2006), 1–8; Boraine, “Transitional Justice,” 67–72.

¹⁵⁹ The official form of transitional justice is its basic core. Since the major goal of this framework is to advance justice during a transition of a society/ state, then the state’s adoption of transitional justice

are unofficial and are carried out by the civil society.¹⁶⁰ The official form of these measures has a legal “transformation” character and is ideally adopted by the state in transition with an intention to move towards the future through addressing the past violations.¹⁶¹ Furthermore, transitional justice mechanisms can also be enforced by international organs. For example, the International Criminal Court and international tribunals like the ICTY or the ICTR are all established by the UN,¹⁶² and are charged with prosecuting persons charged of committing war crimes, crimes against humanity or genocide.¹⁶³ At the same time, other states can invoke some transitional justice measures. This is usually seen in situations where a state’s criminal procedures law allows its courts to assume a “universal jurisdiction” for certain crimes, usually war crimes, crimes against humanity and genocide and prosecute the perpetrators even when the crime is not related to their own societies.¹⁶⁴

policies is the only way for these policies to be effective. In her “genealogy” of transitional justice, Teitel traced the development of official state and international responses to mass human rights violations since Nuremburg trials. Her study shows how the official form of transitional justice developed over time, resulting in turning it into a “paradigm of rule of law.” See, Teitel, “Transitional Justice Genealogy,” 71; Ambos, “The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC,” 22; International Center for Transitional Justice, “What Is Transitional Justice?”; Boraine, “Transitional Justice,” 67–72.

¹⁶⁰ It has been frequently argued that local unofficial participation in the transitional justice process is essential for the success of such process. This is due to the fact that local non-governmental participation is likely to result in better representation of the needs of the public, as well as making the process more culturally relevant for the local community. See, Lorna McGregor, “International Law as a ‘Tiered Process’: Transitional Justice at the Local, National and International Level,” in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, ed. Kieran McEvoy and Lorna McGregor (Hart Publishing, 2008), 47–73; Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, 2nd ed. (New York: Routledge, 2011), 16–7; Louis Bickford, “Unofficial Truth Projects,” *Human Rights Quarterly* 29, no. 4 (2007): 994–1035.

¹⁶¹ As Call mentions, transitional justice is mainly about creating “justice systems so as to prevent future human rights atrocities.” See, Call, “Is Transitional Justice Really Just,” 101; See also, Roht-Arriaza, “The New Landscape of Transitional Justice,” 2; Teitel argues that a special conception of rule of law is applicable in cases of transition. In transitional periods, she argues, law has a special “transformative” function. See, Ruti G. Teitel, “Transitional Rule of Law,” in *Rethinking The Rule of Law After Communism*, ed. Adam W. Czarnota, Martin Krygier, and Wojciech Sadurski (Central European University Press, 2006), 279–80.

¹⁶² UN General Assembly, “Rome Statute of the International Criminal Court”; UN Security Council, “Statute of the International Tribunal for Rwanda”; UN General Assembly, “Rome Statute of the International Criminal Court.”

¹⁶³ This was discussed in sec. 5.2.2 and in Chapter 4 above.

¹⁶⁴ Ambos, “The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC,” 59–60; Christine Bell, “The ‘New Law’ of Transitional Justice,” in *Building a Future on Peace and Justice: Studies on Transitional Justice, Conflict Resolution and Development: The Nuremberg*

Transitional justice mechanisms are usually listed in the four categories that appear in the ICTJ definition above: the first is criminal prosecutions against persons in power who were responsible for significant international crimes; the second is truth seeking initiatives that aim at finding out unknown information concerning violations and/or expressing acknowledgment of injustices; the third is reparations programs, which include restitution of property, compensation and other types of reparations; and the fourth is various kinds of institutional reforms for those state institutions, such as the judiciary, army, police and others that conducted the violations.¹⁶⁵

It has become a widely accepted notion that the implementation of the transitional justice framework should be carried out by endorsing a holistic approach that employs all the appropriate measures for the violation.¹⁶⁶ While pursuing this approach special attention is given to the context of the violation and the results that are sought after the measures are implemented. Moreover, the transitional justice framework is

Declaration on Peace and Justice, ed. Kai Ambos, Judith Large, and Marieke Wierda (Springer, 2009), 108; Ellen L. Lutz and Caitlin Reiger, *Prosecuting Heads of State* (Cambridge University Press, 2009), 34–8; Kenneth C. Randall, “Universal Jurisdiction Under International Law,” *Texas Law Review* 66 (1988 1987): 785.

¹⁶⁵ It is widely accepted in transitional justice literature that there are four categories of measures to redress a human rights violations legacy: truth, reparations, accountability and state institutions reform. Roger Duthie, “Transitional Justice and Displacement,” *International Journal of Transitional Justice* 5, no. 2 (July 1, 2011): 243; International Center for Transitional Justice, “What Is Transitional Justice?”; Bell, “Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’,” 6–10; Boraine adds a fifth element for a holistic transitional justice approach: Reconciliation. This is based on the experience of several transitional societies organizing commissions for truth and reconciliation. Boraine, “Transitional Justice”; Ambos cites all these measures as well, but also adds one additional element, namely the “disarmament, demobilizing and reintegration” of former members of armed groups. Ambos, “The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC,” 48.

¹⁶⁶ Barbara Ooman, “Justice Mechanisms and the Question of Legitimacy: The Example of Rwanda’s Multi-layered Justice Mechanisms,” in *Building a Future on Peace and Justice: Studies on Transitional Justice, Conflict Resolution and Development: The Nuremberg Declaration on Peace and Justice*, ed. Kai Ambos, Judith Large, and Marieke Wierda (Springer, 2009), 179; Pablo De Greiff, “DDR and Reparations: Establishing Links Between Peace and Justice Instruments,” in *Building a Future on Peace and Justice: Studies on Transitional Justice, Conflict Resolution and Development: The Nuremberg Declaration on Peace and Justice*, ed. Kai Ambos, Judith Large, and Marieke Wierda (Springer, 2009), 344–8; Boraine, “Transitional Justice,” 68; Bell, “Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’,” 19; Duthie, “Transitional Justice and Displacement,” July 1, 2011, 258; Oskar NT Thoms, James Ron, and Roland Paris, *The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners*, CIPS Working Paper (University of Ottawa: Centre for International Policy Studies, April 2008), 24–5.

victim-centric, seeking to guarantee that the transition takes into consideration the needs of the victim.¹⁶⁷

In 2004, the UN Secretary-General's report on "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies" confirmed these notions and stressed the importance of using a holistic/ comprehensive approach when dealing with the injustices of the past. It stated:

Our experience confirms that a piecemeal approach to the rule of law and transitional justice will not bring satisfactory results in a war-torn or atrocity-scarred nation. Effective rule of law and justice strategies must be comprehensive, engaging all institutions of the justice sector, both official and non-governmental, in the development and implementation of a single nationally owned and led strategic plan for the sector. Such strategies must include attention to the standards of justice, the laws that codify them, the institutions that implement them, the mechanisms that monitor them and the people that must have access to them.¹⁶⁸

This statement in the Secretary General's report is representative of the transitional justice theory. Not only does it stress comprehensiveness and standards of justice, but it further demonstrates that a transitional justice process is expected to reform the legal system and state institutions in order to guarantee a continued access to justice.

Hence, given all these definitions, one may argue that transitional justice as a theoretical framework can be understood as a field that studies peace promotion through

¹⁶⁷ For example, the Truth and Reconciliation Commission's report in 2003 explicitly stated that it took a "victim centred" approach. See, Truth and Reconciliation Commission of South Africa, *Truth and Reconciliation Commission of South Africa Report* (Cape Town, March 21, 2003), 168; In 2008 Jordan, Germany and Finland organized a conference at Nuremburg to explore the relationship between peace and justice. As a result of the conference, they issued a document that they called "The Nuremburg Declaration on Peace and Justice" in which they declared a number of relevant principles. One of these principles was the importance of the "victim-centered approach" because "victims are central to peacebuilding, justice and reconciliation and should play an active role in such processes. Their concerns should be a high priority." See, Hashemite Kingdom of Jordan, Finland, and Germany, "Nuremburg Declaration on Peace and Justice," June 19, 2008, sec. III(3), Annex to the letter dated 13 June 2008 from the Permanent Representatives of Finland, Germany and Jordan to the United Nations addressed to the Secretary-General, UN. Doc. A/62/885; Furthermore, many other authors and contributors have stressed or pre-assumed the importance of a victim-centered approach. See, Simon Robins, "Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Post-conflict Nepal," *International Journal of Transitional Justice* 5, no. 1 (March 1, 2011): 77–8; See also, Raquel Aldana, "A Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities," *Journal of Human Rights* 5, no. 1 (2006): 107.

¹⁶⁸ United Nations Security Council, "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies," 23.

remedies for massive human rights violations. Indeed, its measures are consistent with the general principles of international law and seek to implement them. A quick look at the four categories of measures will show that they echo the remedies required by international law for an internationally wrongful act. Prosecutions of persons who conducted mass human rights violations answer a state's obligation to hold such persons accountable in accordance with the individual criminal responsibility principles.¹⁶⁹ Similarly, truth seeking initiatives, reparations and legal and institutional reforms are aimed at guaranteeing non-repetition,¹⁷⁰ and reparation¹⁷¹ with its three components: restitution,¹⁷² compensation¹⁷³ and satisfaction¹⁷⁴ as required by the law of state responsibility.¹⁷⁵

In other words, the relationship between international law remedies and transitional justice is similar to that between food ingredients and cooking recipes. In order to make a good meal, one needs to bring the ingredients together in meaningful ways and add the spices at the right time and in the right quantities. It is needless to say that different meals have different recipes. Transitional justice is international law remedies brought to action.

Based on this theoretical framework, we can now turn to the practical implications of applying a transitional justice approach in response to the displacement issue in the Palestinian-Israeli conflict. The next section will present an analysis of the potential remedies to the displacement issue in accordance with a transitional justice framework.

5.3.2 Transitional Justice and Displacement: What are the Meaningful Remedies to Israel's Systematic Policy?

In a video interview conducted and published by the Guardian newspaper, an old man called Yacoub Odeh walked around the ruins of his de-populated and partly-

¹⁶⁹ See, sec. 5.2.2 above.

¹⁷⁰ International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts," Article 30.

¹⁷¹ Ibid., Article 31.

¹⁷² Ibid., Article 35.

¹⁷³ Ibid., Article 36.

¹⁷⁴ Ibid., Article 37.

¹⁷⁵ See discussion of this law in sec. 5.2.1 above.

destroyed village Lifta, and spoke about his memories in the village before being displaced during the 1948 war.¹⁷⁶ The interview happened at a time when Israel was planning to erase the remaining ruins of the village and build a luxurious residential colony.¹⁷⁷ Standing in front of his house, Odeh complained:

You can't imagine how I feel when I look [at] our grandfathers' houses. And I can't come, and I can't sit in [them].¹⁷⁸ These [are] our fathers' and grandfathers' houses. Now they want to destroy [them] so as to build luxury villas for rich people [who] came from USA or anywhere. They want to destroy our history, our heritage [and] our memories to build [a] colonial resort in Lifta [...] Lifta is [an] eyewitness on the *Nakba*. It should remain [an] eyewitness for the history. What happened in this place [is] people kicked out [and] houses destroyed.¹⁷⁹

With his statement, Odeh is expressing his deep feeling of injustice. Not only is he unable to return to reside in his village, but Israel wants to even “destroy” his history, heritage and memories. His appearance in this and many other videos and reports¹⁸⁰ was part of the village community's activism to stop the potential destruction of the village ruins.

In another documentary film, Itzik Shaweky, the secretary of “Society for Preservation of Israel Heritage Sites”¹⁸¹ was asked by the interviewer whether it would be a good idea to keep Lifta or develop it as an historical site as a symbolic gesture. Shaweky strongly disagreed and added:

[...] If I turn it into a monument and say: “On this site there was an Arab village,” that will only lead to hatred and painful memories because we would then be causing conflict. And then they are going to say: “this is how we once lived and

¹⁷⁶ Mat Heywood, *Going Back to Lifta: a Palestinian Exile Returns - Video* (The Guardian, 2011), <http://www.guardian.co.uk/world/video/2011/may/30/palestinian-israel-back-to-lifta-video>.

¹⁷⁷ Harriet Sherwood, “The Ruined Village Palestinians Will Never Forget,” *The Guardian*, May 29, 2011, <http://www.guardian.co.uk/world/2011/may/29/ruined-palestinian-village-lifta-development>; Melanie Lidman, “Apartments to Be Built on Top of Abandoned Arab Village,” *www.JPost.com*, January 28, 2011, <http://www.jpost.com/NationalNews/Article.aspx?id=205588>.

¹⁷⁸ What Odeh is referring to here is that he is not allowed to reside in his own village due to the Israeli restrictions since 1948.

¹⁷⁹ Mat Heywood, *Going Back to Lifta*.

¹⁸⁰ Many reports and other material on Lifta is available on the website “Lifta Society” which was built by the refugees from Lifta in order to preserve a virtual memory of their village and advocate for their rights. See, “Lifta Society,” accessed February 17, 2013, <http://www.liftasociety.org/>.

¹⁸¹ This is an Israeli non-governmental organization that “was established for the purpose of locating, restoring and preserving heritage sites in Israel.” See, “SPIHS - Society for Preservation of Israel Heritage Sites,” accessed February 17, 2013, <http://www.shimur.org/english/content.php?id=1>.

then the Jews threw us out.” No. I’m not going to do that. We are the state of Israel. We are Jews. We don’t have to save the Palestinian heritage. They will know that it was Lifta but we are a new nation that has to progress.¹⁸²

Shaweky’s emphasis on the notion that as a Jewish state, Israel should not save the Palestinian heritage is representative of the state’s continued denial of the history and present. Shaweky is aware of the history, but he is afraid it will be used against Israel. He does not want Lifta to become a Palestinian monument that reminds people of the injustices that took place, which leads him to prefer to “develop” the site into luxurious villas for Israelis and start a new chapter. Notably, he expressed a fear that the revival of the “painful memories” will “only lead to hatred” and conflict. Indeed, the contrast between Shaweky’s and Odeh’s views represents an important aspect of the conflict and the solutions discourse.

As shown in previous chapters, forced displacement has been a constant feature of the conflict since its early stages. Moreover, while displacement continues until the current day, the consequences of past and present waves of transfer and deportations have been among the unresolved issues in the conflict.¹⁸³

In light of this background, the transitional justice framework might have a lot to offer to both Palestinians and Israelis. The potential advantage of this approach is essentially that it endeavours to balance Odeh’s need to preserve his rights, as well as his “history, heritage and memory,” and Shaweky’s fear that an acknowledgment would lead to further “hatred” and “conflict.”

The dilemma found here is not unique to the Palestinian-Israeli conflict. Indeed, the world has witnessed similar atrocities of ethnic cleansing during the last few decades. Recent research has indicated an increased incorporation of transitional justice measures into the responses to displacement.¹⁸⁴ In 2004, the UN Secretary-General’s report on transitional justice argued:

¹⁸² Menachem Daum and Public Broadcasting Service (PBS), *Lifta*, Religion & Ethics NewsWeekly, 2011, <http://www.pbs.org/wnet/religionandethics/episodes/april-22-2011/lifta/8667/>.

¹⁸³ See, sec. 5.1 above.

¹⁸⁴ See generally, Duthie, “Transitional Justice and Displacement,” July 1, 2011; Megan Bradley, *Displacement, Transitional Justice and Reconciliation: Assumptions, Challenges and Lessons*, Policy Briefing, Forced Migration Policy Briefings (Oxford: Refugees Studies Centre, Oxford Department of International

The challenges of post-conflict environments necessitate an approach that balances a variety of goals, including the pursuit of accountability, truth and reparation, the preservation of peace and the building of democracy and the rule of law. A comprehensive strategy should also pay special attention to abuses committed against groups most affected by conflict, such as ... displaced persons and refugees, and establish particular measures for their protection and redress in judicial and reconciliation processes.¹⁸⁵

Displacement is a phenomenon that takes place during conflicts or under suppressive regimes. During any transition to peace or democracy remedies have to be provided to those who were displaced from their homes. But especially in cases where displacement is forced, most notably in ethnic cleansing attempts that aim at changing the demographic composition of a territory by force and regulation, redressing the consequences of displacement becomes a core issue in the transition. Universal experience offers numerous examples of using the transitional justice framework in remedying the consequences of displacement. In South Africa, Bosnia, Sierra Leone, East Timor, Liberia and Colombia displacement was a key issue in their conflicts and transitions. The overarching principle while implementing transitional justice measures for displacement can be summarized by the promotion of human rights standards. This has been described eloquently by Roger Duthie who explains that transitional justice aims at redressing the legacies of massive human rights abuses, whereby “redressing the legacies’ means, primarily, giving force to human rights norms that were systematically violated.”¹⁸⁶ The UN Secretary-General’s report to the Security Council asserts that “justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives.”¹⁸⁷

In the transitional justice framework, force is given to human rights norms through the implementation of comprehensive measures that aim at remedying the past’s harm

Development, University of Oxford, April 2012), <http://www.rsc.ox.ac.uk/publications/policy-briefings/rscpb9-displacement-transitional-justice-reconciliation-250412-en.pdf/view>; Roger Duthie, ed., *Transitional Justice and Displacement*, Advancing Transitional Justice 5 (Social Science Research Council, 2012).

¹⁸⁵ United Nations Security Council, “The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies,” 7.

¹⁸⁶ Duthie, “Transitional Justice and Displacement,” July 1, 2011, 243.

¹⁸⁷ United Nations Security Council, “The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies,” 1.

and guaranteeing non-repetition in the future by implementing just durable solutions, restitution of property, compensation, reforming the legal system and state institutions and revealing the truth.

This section will examine the way transitional justice measures could tackle displacement and its consequences. It will do so by drawing from the experiences of other countries with displacement problems and applying the concepts on the Palestinian-Israeli conflict. The first sub-section will discuss truth-seeking initiatives in theory and practice, and assess the potential contribution that a truth commission can provide in light of Israel's continuous denial of responsibility for the plight of the Palestinian refugees and displaced persons. After that, the second sub-section will examine the question of accountability for the perpetrators of the crime of displacement in light of the international legal principles, as well as international experiences in prosecuting the perpetrators of the crime of forced displacement. This sub-section will shed light on the admission of Palestine as a non-member observer state at the UN, and the potential that this might provide in relation to the question of accountability and international criminal justice. Finally, the third sub-section will discuss the reparations that should be provided to the victims of forced displacement, coupled with legal and institutional reforms. As will be shown in this section, the appropriate reparations that meaningfully redress the victims of displacement are return, restitution of property and compensation. However, such remedies cannot be provided while a discriminatory and suppressive political legal system is still in place.

5.3.2.1 Truth and Acknowledgment

5.3.2.1.1 The Need for Truth in Relation to Displacement in the Palestinian-Israeli Conflict

The question of truth in relation to Israel's systematic displacement is one of the important issues that have not been formally addressed in the context of the Palestinian-

Israeli conflict and peace process.¹⁸⁸ Israel maintains a position according to which it denies any responsibility on the mass displacements of Palestinians. It exercises this denial in several ways. The major obvious form is that the Zionist historical narrative, until the current day, continues to maintain a position that Israel had no responsibility in relation to the mass exoduses of 1948 and 1967.¹⁸⁹ To cement this narrative, Israel continues to change the physical features of several areas from which Palestinians were displaced in a way that erases any trace of past Palestinian presence.¹⁹⁰ For example, after the 1967 occupation of the West Bank, Israel demolished three Palestinian villages in the Latroun area, forcibly displaced their population and constructed a recreational park known as Canada Park in their place.¹⁹¹ In a documentary film produced by the Palestinian human rights organization Al-Haq, the Israeli historian Ilan Pappé commented on how constructing this park aimed at erasing the Palestinian history of the village with the following statement:

A very important part of the ethnic cleansing policy is re-writing the history of the country. You don't just erase the Palestinian villages but you also try to erase the Palestinians out of memory. These recreation parks, like the Canada Park, play a very important role in this exercise because they are planted on a destroyed village and by that they fulfil a very important role. Then they are educational recreational parks, I mean many high school children and elementary school children are going there by invitation and if you follow the signs in the park, like in the other parks that were built on destroyed Palestinian villages, you can easily see how these signs tell a narrative which totally erases the Palestinian Arab parts of the country.¹⁹²

¹⁸⁸ Nur Masalha, *Catastrophe Remembered: Palestine, Israel and the Internal Refugees* (Zed Books, 2005), 4.

¹⁸⁹ Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem*, 67–8; Glazer, “The Palestinian Exodus in 1948,” 97; Nur Masalha, “60 Years After the Nakba: Historical Truth, Collective Memory and Ethical Obligations,” *Kyoto Bulletin of Islamic Area Studies* 3, no. 1 (July 2009): 39.

¹⁹⁰ Pappé explains how Israel created forests and recreational parks in the place of Palestinian villages in order to totally erase their trace. See, Ilan Pappé, *The Ethnic Cleansing of Palestine* (Oxford Newworld, 2007), 225–234; Masalha, *Catastrophe Remembered*, 8.

¹⁹¹ Nur Masalha, *A Land Without a People: Israel, Transfer, and the Palestinians, 1949-96* (Faber and Faber, 1997), 81; John Reynolds and Al-Haq, *Where Villages Stood: Israel's Continuing Violations of International Law in Occupied Latroun, 1967-2007* (Ramallah, Palestine: Al-Haq, 2007); John Quigley, *The Case for Palestine: An International Law Perspective*, 2nd ed. (Durham & London: Duke University Press, 2005), 159; Trish Wood, *Park With No Peace: Canada Park*, 1991, <http://www.youtube.com/watch?v=mcZL-z9fdLA>.

¹⁹² Hanna Musleh, *Memory of the Cactus*, 2008, http://www.youtube.com/watch?v=DQ_LjknRHVA.

Similarly, the Palestinian intellectual and former member of the Israeli parliament Azmi Bishara argued in relation to the whole policy of erasing the Palestinian villages from memory:

The villages that no longer exist were forced out of the [Israeli] public awareness, away from the signposts of memory. They received new names –of Jewish settlements- but traces [of their past] were left behind, like the *sabr* [i.e. cactus] bushes, or the stones from fences or bricks from the demolished houses.¹⁹³

This method of systematic denial as explained by Pappe and Bishara aims at erasing Israel's "original sin" (as Morris calls the creation of the Palestine refugee issue)¹⁹⁴ from memory. However, Israel has used additional methods to resist the remembrance of the *Nakba*. In 2011, the Israeli parliament enacted a legislation known unofficially as the "Nakba Law"¹⁹⁵ according to which public funds deprivation would be enforced upon any "entity" in Israel that commemorates Israel's "Independence Day or the day of the establishment of the state as a day of mourning," or rejects "the existence of the state of Israel as a Jewish and democratic state."¹⁹⁶ This law is expected to affect all publicly funded institutions including local councils, schools, cultural centres and many others.¹⁹⁷ Human rights organizations petitioned against the law claiming that it was discriminatory and that it violates freedom of speech, but the Israeli Supreme Court rejected the petition.¹⁹⁸

¹⁹³ Quoted in, Masalha, *Catastrophe Remembered*, 8.

¹⁹⁴ Benny Morris, "The New Historiography: Israel Confronts Its Past," in *Making Israel*, ed. Benny Morris, vol. 1st (USA: The University of Michigan Press, 2007), 20.

¹⁹⁵ This law was first suggested by a right wing party in the Israeli parliament and endorsed by a majority of the members. See, "Lieberman's Party Proposes Ban on Arab Nakba," *Haaretz.com*, May 14, 2009, <http://www.haaretz.com/news/lieberman-s-party-proposes-ban-on-arab-nakba-1.276035>; Over time, the law came to be known as the "Nakba Law" because its purpose was to resist the commemoration of the Palestinian Nakba. See, Adalah and ACRI, "'The Nakba Law' and Its Implications," *Association for Civil Rights in Israel (ACRI)*, May 15, 2011, <http://www.acri.org.il/en/2011/05/15/%E2%80%9Cthe-nakba-law%E2%80%9D-and-its-implications/>; The original intention of this law was to penalize by imprisonment any commemoration of the Nakba. See, Jack Khoury and Jonathan Lis, "Knesset Passes Two Bills Slammed as Discriminatory by Rights Groups," *Haaretz.com*, March 24, 2011, <http://www.haaretz.com/print-edition/news/knesset-passes-two-bills-slammed-as-discriminatory-by-rights-groups-1.351462>.

¹⁹⁶ *Budget Foundations Law (Amendment No. 40) 5771- 2011*, accessed February 22, 2013, Unofficial translation provided by Adalah, available at: http://adalah.org/upfiles/2011/discriminatory_laws_2011/Nakba_Law_2011_English.pdf.

¹⁹⁷ Adalah and ACRI, "'The Nakba Law' and Its Implications."

¹⁹⁸ Khoury and Lis, "Knesset Passes Two Bills Slammed as Discriminatory by Rights Groups"; Jack Khoury and Jonathan Lis, "Human Rights Groups Petition High Court to Overthrow 'Nakba Law',"

Another form of denial, which has not been noticed or reported as such, is the secrecy with which Israel treats several details concerning the displacement methods and victims. Although Chapters 2 and 3 have referred to several forms of such conduct, it is useful to give a number of examples for the sake of the current discussion. For example, when Israel started revoking the residencies from Palestinian Jerusalemites with the beginning of the peace process, it did so without introducing any legal changes or making any announcements that would allow people to organize their lives to prevent this revocation.¹⁹⁹ This pattern of secretly changing the laws and regulations is even more frequent in the areas which are run by the military government in the occupied territory. For example, in 1973, the military government restricted family unification severely through an unpublished military order, the effect of which was documented by human rights organizations.²⁰⁰ Similarly, Israeli governments have been secretive about the details of the victims of displacement. For example, the number of those displaced by residency revocation in the West Bank and Gaza has been kept secret until it was revealed recently following petitions in the Supreme Court.²⁰¹

Haaretz.com, accessed February 23, 2013, <http://www.haaretz.com/news/national/human-rights-groups-petition-high-court-to-overthrow-nakba-law-1.359802>.

¹⁹⁹ HaMoked, B'Tselem, and Yael Stein, *The Quiet Deportation: Revocation of Residency of East Jerusalem Palestinians* (B'Tselem; HaMoked, 1997), 12. citing a letter sent from the legal department in the Ministry of Interior to HaMoked in 1994 stating that "the Minister of Interior has broad discretion in granting approvals/permits, and he is not required to state reasons for his decision... Because he has no duty to state reasons, there is also no cause to issue internal directives to assist in exercising the said discretion"; Leah Tsemel, "Continuing Exodus - The Ongoing Expulsion of Palestinians from Jerusalem," *The Palestine Yearbook of International Law* 9 (1997 1996): 43–5.

²⁰⁰ HaMoked and B'Tselem, *Families Torn Apart: Separation of Palestinian Families in the Occupied Territories*, 30; HaMoked and B'Tselem, *Perpetual Limbo: Israel's Freeze on Unification of Palestinian Families in the Occupied Territories* (B'Tselem and HaMoked, 2006), 9; Human Rights Watch, "Forget About Him, He's Not Here:" *Israel's Control of Palestinian Residency in the West Bank and Gaza* (New York, N.Y.: Human Rights Watch, February 2012), 7.

²⁰¹ Omer Knobler to HaMoked, center for the Defence of the Individual and Ido Bloom, "AdmPet 28741-02/11 HaMoked: Center for the Defence of the Individual v. Coordinator of Government Activities in the Territories et al. -Demand for information regarding 'inactive' status for Palestinian Residents," March 30, 2011, Hamoked provides unofficial English Translation, available at: http://www.hamoked.org/files/2011/114221_eng.pdf; Guy Inbar to Ido Bloom and HaMoked, center for the Defence of the Individual, "Response to your application under the Freedom of Information Act on the issue of deportation and revocation of residency in the Judea and Samaria Area and in the Gaza Strip," Response to application under the Freedom of Information Act, June 10, 2012, Unofficial English Translation is provided by Hamoked, available at: http://www.hamoked.org/files/2012/155760_eng.pdf.

Moreover, because the displacement is legalized by the regime, the blame is usually pointed toward the victim himself. For example, in the *Shaheen vs. IDF Commander in the Gaza Strip* case (discussed in Chapter 2)²⁰², the victim of deportation was convicted with the crime of “infiltration” and blamed for his own fate.²⁰³ Despite the fact that the victim had been a resident of the Gaza Strip, the court found his deportation lawful and stated: “The authority to issue a deportation order against him derives from his act of infiltration.”²⁰⁴ This example shows how the regime presents the deportation of those who are entitled to live in their homes as merely rule of law. According to this rationale, since Israel’s laws do not give the displaced person the right to reside in his home, then deportation is an appropriate legal measure.

Unfortunately, as explained earlier, the peace process framework was designed in a way that builds on Israel’s constant denial. Notably, it does not include a declaration of responsibility in relation to any of the waves of displacement. While the 1948 “refugees” issue was postponed to the final status negotiations,²⁰⁵ the reference to the conditional return of the “displaced persons” used the neutral wording “admission,” instead of “return.”²⁰⁶ Furthermore, victims of forced residency revocations were called “those who lost their ID cards,” and the solution was also a conditional negotiated “reissuance” of their ID cards.²⁰⁷ As explained earlier, no progress has been made yet in addressing the displacement problem.²⁰⁸ On the contrary, forced displacement was introduced in new

²⁰² See, Chapter 2, sec. 2.3.3 above.

²⁰³ HCJ 159/84, Abdul Aziz Ali Shaheen vs. the IDF Commander in the Gaza Strip Area, Piskei Din (Judgments of the Supreme Court of Israel), vol.39, part1, at 309-336 (1985), Translated to English and published in 3 Pal. Y.B. Int’l L. 114, 1986 (Israeli Supreme Court 1985).

²⁰⁴ Ibid., para. 4.

²⁰⁵ Arab Republic of Egypt and Israel, “The Camp David Framework Agreement,” sec. A(1)(F); Israel and Jordan, “Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan”; Israel and Palestine Liberation Organization, “Declaration Of Principles On Interim Self-Government Arrangements,” Article V(3); Israel and Palestine Liberation Organization, “Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip,” Article XXXI.

²⁰⁶ Arab Republic of Egypt and Israel, “The Camp David Framework Agreement,” Article A(e); Israel and Jordan, “Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan,” Article 8(2); Israel and Palestine Liberation Organization, “Declaration Of Principles On Interim Self-Government Arrangements,” Article XII.

²⁰⁷ Israel and Palestine Liberation Organization, “Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip,” Appendix III, Article 28(3).

²⁰⁸ See, sec. 5.1 above.

ways after the peace process started.²⁰⁹ Obviously, this methodology of addressing the plight of displacement has proven to fail. One of the aspects of its failure is that truth was concealed in the peace process. This section will argue that truth seeking initiatives within the transitional justice framework have the potential of adequately addressing this problem. This argument will be presented based on transitional justice theory as well as its practice in a number of transitional societies.

5.3.2.1.2 Truth-Seeking Initiatives in Theory and Practice in Displacement Problems

The forms of denial discussed above are not unique to the Palestinian-Israeli conflict. In most of the cases of conflict and suppressive regimes there is a need to reveal the truth and get the state to reveal and/or acknowledge injustices that took place during the conflict or repressive regime.²¹⁰ In fact, revealing the truth about violations of human rights and humanitarian law has been argued to be a right vested in individuals and collectives alike.²¹¹ To address this right, truth revealing initiatives as a remedy to past mass human rights violations were used in several contexts.²¹² In particular, “truth commissions” were introduced as an innovation affiliated with the rise of the concept of transitional justice, creatively dealing with questions of truth and acknowledgment that rose during conflicts and repressive regimes.²¹³ What might be especially creative about

²⁰⁹ See generally Chapter 3.

²¹⁰ Office of the United Nations High Commissioner for Human Rights, *Rule-of Law Tools for Post-Conflict States: Truth Commissions*, Rule of Law Tools for Post Conflict States (Geneva and New York: UN OCHA, 2006), 1, UN. Doc. HR/PUB/06/1.

²¹¹ Diane Orentlicher, “Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity” (UN Commission on Human Rights, February 27, 2004), UN. Doc. E/CN.4/2004/88; Diane Orentlicher, “Report of the Independent Expert to Update the Set of Principles to Combat Impunity: Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity” (UN Commission on Human Rights, February 8, 2005), Principle 2, U.N. Doc. E/CN.4/2005/102/Add.1, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>; Hayner, *Unspeakable Truths*, 23–4; ICTJ, “Truth and Memory,” *ICTJ Website*, accessed March 6, 2013, <http://www.ictj.org/our-work/transitional-justice-issues/truth-and-memory>; *Truth Seeking: Elements of Creating an Effective Truth Commission* (Brasilia and New York: Amnesty Commission of the Ministry of Justice of Brazil and International Center for Transitional Justice, 2013), 3–4, <http://ictj.org/publication/truth-seeking-elements-creating-effective-truth-commission>.

²¹² In her book on truth commissions, Hayner documented and discussed the work of forty truth commissions that were functioning between 1979 and 2009. See, Hayner, *Unspeakable Truths*, XIV.

²¹³ The first truth commission was established in Argentina in 1983. It was mainly charged with knowing the whereabouts and the destiny of those who were forcibly disappeared by the previous regime.

these commissions is the special attention that was given to the victims' narrative to be told and recognized as part of the transition and reparation process.²¹⁴ In the traditional approach to justice which was followed during the Nuremberg trials period, the major focus was on the state's right to punish perpetrators of atrocities and the victim was not the focus of such process.²¹⁵ Transitional justice framework has changed this approach and shifted the position of the victim in the transition into a much more central one and his role into an active one.²¹⁶

Truth commissions are non-judicial bodies formally established by the state, with the aim of finding the truth about past human rights violations and recommending further measures to advance justice in the transitional period.²¹⁷ The most commonly cited definition of truth commissions was advanced by Hayner in her book that studied forty truth commissions where she defined a truth commission as a body that is:

(1) Focused on the past, rather than on-going events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population gathering information on their experiences; (4) is a temporary body with the aim of concluding with a final report; and (5) is officially authorized or empowered by the state under review.²¹⁸

A truth seeking initiative as a remedy has several goals. The first and most important one is to establish a credible account on the history as far as it is related to human rights abuses and end the patterns of denial that were dominant before the

See, *ibid.*, 10; It is widely considered that the Argentinean experience marked the rise of the concept of transitional justice. See, B. A. Leebaw, "The Irreconcilable Goals of Transitional Justice," *Human Rights Quarterly* 30, no. 1 (2008): 99; Teitel explains that in the 1980s and 1990s several responses to past human rights violations focused on truth and a relationship between truth and justice was emphasised. See, Teitel, "Transitional Justice Genealogy," 78–9.

²¹⁴ Ruti G. Teitel, *Transitional Justice* (Oxford University Press, 2000), 81–3; Elizabeth Salmón G., "Reflections on International Humanitarian Law and Transitional Justice: Lessons to Be Learnt from the Latin American Experience," *International Review of the Red Cross* 88, no. 862 (2006): 352; Hayner, *Unspeakable Truths*, 22.

²¹⁵ Devin Pendas, "'Law, Not Vengeance' Human Rights, the Rule of Law, and the Claims of Memory in German Holocaust Trials," in *Truth Claims: Representation and Human Rights*, ed. Mark Bradley and Patrice Petro (Rutgers University Press, 2002), 32–3.

²¹⁶ Office of the United Nations High Commissioner for Human Rights, *Rule-of Law Tools for Post-Conflict States: Truth Commissions*, 2; Aldana, "A Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities," 108.

²¹⁷ Ambos, "The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC," 40–1.

²¹⁸ Hayner, *Unspeakable Truths*, 11–2.

transition.²¹⁹ Truth commissions are designed to deal with different types of denial. Most significantly, one can distinguish between cases where the facts are not known and need to be revealed, such as the whereabouts of those forcibly disappeared; and situations where the facts are commonly known but are denied by the state and part of the society.²²⁰ The revealing of truth based on a methodological examination of the facts makes a significant contribution to start a new era based on the exclusion of conflicting parties' and repressive regimes' propagandas. By establishing a more "comprehensive and holistic account" of the past events, truth commissions make the injustices undeniable.²²¹ Second, truth commissions give a platform for victims to play an active role in the transition by allowing them to actively participate by explaining the injustices that they endured.²²² This participation in turn helps the victims to heal and restores some of their abused dignity.²²³ Third, the information collected by truth commissions is usually utilized for designing additional remedies, including reparations and institutional reforms.²²⁴ Fourth, truth commissions usually expose the perpetrators of human rights violations and present recommendations on how to prevent impunity.²²⁵ These four categories of goals that truth commissions usually attempt to foster non-repetition of human rights abuses and push the society to open a new page.

Truth Commissions have investigated various types of human rights violations including the crime of forced displacement. While the early experiences of truth commissions did not include deportation or forcible transfer in their mandates,²²⁶ the

²¹⁹ Ibid., 20–22; Office of the United Nations High Commissioner for Human Rights, *Rule-of Law Tools for Post-Conflict States: Truth Commissions*, 1–2.

²²⁰ Hayner, *Unspeakable Truths*, 21–2; Office of the United Nations High Commissioner for Human Rights, *Rule-of Law Tools for Post-Conflict States: Truth Commissions*, 2.

²²¹ Janine Natalya Clark, "The Limits of Retributive Justice Findings of an Empirical Study in Bosnia and Hercegovina," *Journal of International Criminal Justice* 7, no. 3 (July 1, 2009): 480.

²²² Hayner, *Unspeakable Truths*, 22; Office of the United Nations High Commissioner for Human Rights, *Rule-of Law Tools for Post-Conflict States: Truth Commissions*, 2; Clark, "The Limits of Retributive Justice Findings of an Empirical Study in Bosnia and Hercegovina," 480; ICTJ, "Truth and Memory."

²²³ Hayner, *Unspeakable Truths*; ICTJ, "Truth and Memory."

²²⁴ Hayner, *Unspeakable Truths*, 23.

²²⁵ Ibid., 22.

²²⁶ For example, the truth commission in Argentina focused on those who were forcibly disappeared. Its goal was to find out their whereabouts and give the families of the victims closure. See, *ibid.*, 10; Leebaw, "The Irreconcilable Goals of Transitional Justice," 99; In South Africa's infamous "Truth and

investigation of displacement is increasing in states where this crime was conducted.²²⁷ In fact, international frameworks have made references to questions of truth in relation to displacement. For example, in 1998, the UN Commission on Human Rights adopted “Guiding Principles on Internal Displacement,” which declared that internally displaced persons “have the right to know the fate and whereabouts of missing relatives,” and laid the burden of finding out this information on “the authorities concerned.”²²⁸ In 2010, Walter Kalin, the “Representative of the Secretary-General on the human rights of internally displaced persons” issued a report laying out a “Framework on Durable Solutions for Internally Displaced Persons.”²²⁹ This framework stated that internally displaced persons (IDPs) “must be consulted and participate extensively in the planning and management of the processes supporting a durable solution,” without discrimination based on age, sex or other criteria.²³⁰ In addition, the framework provided that:

IDPs who have been victims of violations of international human rights or humanitarian law, including arbitrary displacement must have full and non-discriminatory access to effective remedies and access to justice, including, where appropriate, access to existing transitional justice mechanisms, reparations and information on the causes of violations.²³¹

Indeed, the incorporation of the plight of displaced persons is an essential development in the transitional justice framework. As Megan Bradley asserts:

It is important to include forced migration in investigatory mandates of truth commissions and to ensure that displaced persons themselves are able to participate in truth commissions and benefit from any other forms of redress, such

Reconciliation Commission” for example, the mandate commission only included “the killing, abduction, torture or severe ill treatment of any person.” See, *Promotion of National Unity and Reconciliation Act 34*, 1995, sec. 1; The absence of displacement happened in the South Africa’s Truth and Reconciliation Commission’s mandate happened despite the fact that forced displacement was one of the significant human rights abuses of the apartheid regime. Hayner categorized forced displacement as “significant act that was not investigated by the commission.” See, Hayner, *Unspeakable Truths*, 266.

²²⁷ Megan Bradley, “Truth-Telling and Displacement: Patterns and Prospects,” in *Transitional Justice and Displacement*, ed. Roger Duthie, Advancing Transitional Justice 5 (Social Science Research Council, 2012), 189.

²²⁸ UN Commission on Human Rights, “Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission Resolution 1997/39. Addendum: Guiding Principles on Internal Displacement,” February 11, 1998, Principle 16, U.N. Doc. E/CN.4/1998/53/Add.2.

²²⁹ UN Human Rights Council, “Framework on Durable Solutions for Internally Displaced Persons,” February 9, 2010, UN Doc. A/HRC/13/21/Add.4.

²³⁰ *Ibid.*, para. 34.

²³¹ *Ibid.*, para. 94.

as compensation, that may emerge as a result of commissions' recommendations.²³²

Indeed, the displaced persons' participation in truth commissions helps the authorities to take their experiences and needs into account when planning additional remedy programs. While displacement is a by-product of most conflicts, it is the main result of conflicts in which one or more of the conflicting parties intentionally inflict such displacement and of situations where human rights violations are practiced systematically and widely. In such cases, a transition becomes meaningful when it addresses not only the consequences of displacement, but also its causes.²³³ Examples of where this remedy has been practiced are Sierra Leone, Liberia and Timor-Leste. In order to form a picture of the relationship between truth-telling initiatives and displacement in practice, let us examine these examples.

Sierra Leone, a country in western Africa, was devastated by a war between the years 1991 and 2002, during which 50,000 people were killed and more than 2 million persons were displaced.²³⁴ Following the end of the war, a peace agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone was signed.²³⁵ This agreement dealt with the war atrocities by first granting a full unconditional "pardon and amnesty" in relation to anything done during the war;²³⁶ and second establishing a Truth and Reconciliation Commission.²³⁷ This commission was established to "address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation."²³⁸ The TRC's mandate

²³² Bradley, "Truth-Telling and Displacement: Patterns and Prospects," 192.

²³³ Bradley wrote a book chapter in 2012 studying the incorporation of the issue of displacement into the work of truth commissions. She stressed that there is a need to investigate the violations that resulted in displacement such as torture, killing, and the like. In addition, she also emphasised the importance of the incorporation of the crime of "forced migration" on its own. See, *ibid.*, 193.

²³⁴ Global IDP Database, *Profile of Internal Displacement: Sierra Leone* (Geneva, October 15, 2003), 6–7.

²³⁵ Government of Sierra Leone and RUF, "Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone," July 7, 1999.

²³⁶ *Ibid.*, Article IX.

²³⁷ *Ibid.*, Article XXVI.

²³⁸ *Ibid.*, Article XXVI (1).

was designed to include the years of the civil war and the commission was charged with recommending “measures to be taken for the rehabilitation of victims of human rights violations.”²³⁹

The TRC report in Sierra Leone has provided a narrative telling how forced displacement took place.²⁴⁰ It reported that forced displacements were “among the most common violations,”²⁴¹ and that they accounted for 19.8% of all reported violations where the pattern was that the victims would “flee from their homes in fear recurring of their lives, leaving attackers in their wake. These attackers would often systematically loot and destroy whatever property had been left behind.”²⁴² The report also gave details about the responsibility of parties to the conflict in inflicting such “systematic forced displacements.”²⁴³ It further showed that especially displaced women were among the most negatively affected by the displacement and dispossession that even “girls as young as 12 were forced to pay for aid with sex in order to gain assistance for their families.”²⁴⁴ The report called upon the local communities to accept displaced to return to their townships “with compassion.”²⁴⁵ Finally, the report recommended the government to assist the most vulnerable in the state, the victims of displacement being among them,²⁴⁶ and to focus on giving remedies like skills training, micro credit, and other types to displaced women.²⁴⁷

Another African experience took place in Liberia, which was torn in civil war between the years 1989 and 2003 during which half of the population was displaced internally and externally.²⁴⁸ A peace agreement was signed between the conflicting parties

²³⁹ Ibid., Article XXVI (2).

²⁴⁰ Sierra Leone Truth and Reconciliation Commission, “Final Report of the Sierra Leone Truth and Reconciliation Commission,” 2004, vols. IIIA, chapter 4, paras. 98–104.

²⁴¹ Ibid., vol. II, chapter 2, para. 25.

²⁴² Ibid., vol. II, chapter 2, para. 86.

²⁴³ Ibid., vol. II, chapter 2, para. 128.

²⁴⁴ Ibid., vol. II, chapter 1, para. 50.

²⁴⁵ Ibid., vol. II, Chapter 3, para. 373.

²⁴⁶ Ibid., vol. II, chapter 3, para. 322.

²⁴⁷ Ibid., vol. II, Chapter 3, paras. 356, 374. Recommendations are summarized in p. 213.

²⁴⁸ Awa Dabo, *In the Presence of Absence: Truth-Telling and Displacement in Liberia*, Case Studies on Transitional Justice and Displacement (ICTJ and Brookings-LSE Project on Internal Displacement, July 2012), 4–6.

in the year 2003, officially ending the state of war.²⁴⁹ This agreement provided that a TRC will be established “to provide a forum that will address issues of impunity, as well as an opportunity for both the victims and perpetrators of human rights violations to share this experience...”²⁵⁰ Furthermore, the peace agreement instructed that the TRC “shall deal with the root causes of the crisis in Liberia, including human rights violations.”²⁵¹ The mandate of the Liberian TRC was further explained by a special statute known as the “Act to Establish a Truth and Reconciliation Commission of 12 May 2005.”²⁵² This act charged the TRC with the task of “investigating gross human rights violations and violations of international humanitarian law...; determining whether these were isolated incidents or part of a systematic pattern; establishing the antecedents, circumstances, factors and context of such violations and abuses; and determining those responsible for the commission of the violations and abuses and their motives as well as their impact on victims.”²⁵³ In addition, the commission was expected to present recommendations on methods to redress the victims of human rights abuses “in the spirit of national reconciliation and healing.”²⁵⁴

The Liberian TRC conducted its investigations at home as well as with refugees in the Diaspora.²⁵⁵ In its report, the commission found that forcible displacement accounted to 36% of the total reported violations,²⁵⁶ as the displaced persons were around half of the total population of Liberia,²⁵⁷ which resulted in displacement being a heavy “social cost of war.”²⁵⁸ It further reported that in refugee camps, children were recruited for joining armed militias and sexual exploitation by aid workers was frequent.²⁵⁹ Liberians

²⁴⁹ The Government of Liberia et al., “Liberia Comprehensive Peace Agreement,” August 18, 2003.

²⁵⁰ Ibid., Article XIII.

²⁵¹ Ibid., Article XIII (2).

²⁵² *An Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia*, 2005.

²⁵³ Ibid., Article IV (a).

²⁵⁴ Ibid., Article IV (e).

²⁵⁵ The Truth commission managed to collect statements from refugees in neighbouring Western African countries as well as in countries like the United States and the United Kingdom. See, Dabo, *In the Presence of Absence: Truth-Telling and Displacement in Liberia*, 9.

²⁵⁶ Truth and Reconciliation Commission of Liberia, “Final Report of the Truth and Reconciliation Commission of Liberia,” 2009, vol. II, p. 262.

²⁵⁷ Ibid., vol. II, p. 282.

²⁵⁸ Ibid., vol. II, p. 271.

²⁵⁹ Ibid., vol. II, p. 272.

abroad actively participated in collecting testimonies for the TRC,²⁶⁰ which eventually helped the report also made reference to those who are in the Diaspora and mentioned the whereabouts of some of them,²⁶¹ and acknowledged their suffering as ones who “share the same experiences of horror, death, loss of family members, hunger, disease as did Liberians in the home land.”²⁶² It further recommended, based on the Liberian Diaspora input²⁶³ that those who acquired a foreign nationality abroad should be allowed to have dual citizenship.²⁶⁴ Finally, the report recommended the implementation of a special traditional type of justice called “*Palava Hut*” which would “foster national healing and reconciliation at the community and grass root levels creating the opportunity for dialogue and peace building.”²⁶⁵ In addition, this measure would “afford anyone who has committed a wrong or crime, whether knowingly or unknowingly, against an individual or the state, to admit wrongful act and seek pardon from the people of Liberia through the *Palava Hut*.”²⁶⁶ The TRC recommended that

the government of Liberia assumes its full responsibility under international law principles and regimes and pursuant to its moral, legal, social, political, cultural, economic and security obligations to its citizens to provide reparations for all those individuals and communities victimized by the years of instability and war.²⁶⁷

Moreover, the TRC recommended that the state should provide reparations to general public (as opposed to individuals), but at the same time give special attention to rehabilitating those whose health has been harmed by the conflict and to very poor victims who need little cash to get them going.²⁶⁸ In addition, it asked the government to give special attention in the reparation program to the displaced, especially women.²⁶⁹

Truth telling initiatives also took place in the aftermath of occupation. Timor-Leste, an Asian country was under the Indonesian occupation between the years 1975 and 1999

²⁶⁰ Bradley, *Displacement, Transitional Justice and Reconciliation*, 201.

²⁶¹ Truth and Reconciliation Commission of Liberia, “Final Report of the Truth and Reconciliation Commission of Liberia,” vol. II, p. 282.

²⁶² *Ibid.*, vol. II, p. 321.

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*, vol. II, p. 396.

²⁶⁵ *Ibid.*, vol. II, p. 365.

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*, vol. II, p. 378.

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*, vol. II, p. 386.

and got its independence after a popular consultation conducted by the UN in 1999.²⁷⁰ The UN then administered Timor-Leste in the transitional period leading to its independence,²⁷¹ and introduced a regulation that created a “Commission for Reception, Truth, and Reconciliation” (Abbreviated as CAVR, derived from the Portuguese official name: Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste) as an “independent authority.”²⁷² This commission was charged with investigating and reporting human rights violations, as well as establishing the truth about them.²⁷³ In addition, the regulation determined that the CAVR would identify “practices and policies” which need to be addressed to ensure non-repetition,²⁷⁴ and to recommend prosecutions where appropriate.²⁷⁵ Furthermore, the commission was charged with promoting reconciliation and human rights, and “supporting the reception and reintegration of individuals who have caused harm to their communities through the commission of minor criminal offences and other harmful acts through the facilitation of community based mechanisms of reconciliation.”²⁷⁶

The CAVR considered the types of human rights violations when it assessed its activities according to its mandate, and listed displacement as one of the issues on which it would focus.²⁷⁷ As a result of its documentation, final report of the commission included

²⁷⁰ UNTAET Department of Public Information, “Background,” *United Nations Transitional Administration in East Timor Website UNTAET*, May 2002, <http://www.un.org/en/peacekeeping/missions/past/etimor/UntaetB.htm>.

²⁷¹ This temporary transitional administration was founded by a UN Security Council resolution in 1999. This resolution decided to establish “a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice;” See, UN Security Council, “Resolution 1272,” October 25, 1999, para. 1.

²⁷² The CAVR was established by a regulation introduced by the UNTAET. See, United Nations Transitional Administration in East Timor, “Regulation No. 2001/10 On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor,” July 13, 2001, sec. 2.2, U.N. Doc. UNTAET/REG/2001/10; Luiz Vieira, *The CAVR and the 2005 Displacement Crisis in Timor-Leste: Reflections on Truth-Telling, Dialogue, and Durable Solutions*, Case Studies on Transitional Justice and Displacement (ICTJ and Brookings-LSE Project on Internal Displacement, July 2012), 4–6.

²⁷³ United Nations Transitional Administration in East Timor, “Regulation No. 2001/10 On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor,” sec. 3(a)–(c).

²⁷⁴ *Ibid.*, sec. 3(d).

²⁷⁵ *Ibid.*, sec. 3(e).

²⁷⁶ *Ibid.*, sec. 3 (g)–(i).

²⁷⁷ Commission for Reception, Truth and Reconciliation in East Timor, *Part 2: Mandate of the Commission*, *Chega! Final Report of the Reception, Truth and Reconciliation in East Timor*, 2005, 5.

a special separate volume for displacement and famine.²⁷⁸ The report documented that deportation has been indeed widespread that almost “every East Timorese person... suffered some form of displacement” during the conflict, and that displacement still continued even during the commission’s mandate.²⁷⁹ Then the report documented the causes of the displacement and the living conditions which the victims had to tolerate.²⁸⁰ Moreover, the report explained methods of coercion applied on the East-Timorese refugees to prevent them from returning.²⁸¹ In relation to responsibility, the CAVR found that the Indonesian civilian and military authorities were

responsible for the forced displacement of hundreds of thousands of East Timorese civilians during the late 1970s and early 1980s and are therefore accountable for the consequences of these actions which were reasonably foreseeable at the time.²⁸²

Finally, the recommendations of the CAVR included meaningful remedies for the displaced persons. The first significant recommendation was that the government of Timor-Leste should implement “UN Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2, 11 February 1998)”²⁸³ when it deals with the displacement problem. These UN Principles were comprehensive, and included various remedies such as return, compensation, and many others.²⁸⁴ Notably, the report made special recommendations regarding reconciliation between Timor-Leste and its previous occupying power Indonesia, endorsing a forward-looking approach aiming at peace and

²⁷⁸ Commission for Reception, Truth and Reconciliation in East Timor, *Forced Displacement and Famine*, Chega! Final Report of the Reception, Truth and Reconciliation in East Timor, 2005.

²⁷⁹ *Ibid.*, 3.

²⁸⁰ *Ibid.*, 8–136.

²⁸¹ *Ibid.*, 142.

²⁸² Commission for Reception, Truth and Reconciliation in East Timor, *Part 8: Responsibility and Accountability*, Chega! Final Report of the Reception, Truth and Reconciliation in East Timor, 2005, 37.

²⁸³ Commission for Reception, Truth and Reconciliation in East Timor, *Part 11: Recommendations*, Chega! Final Report of the Reception, Truth and Reconciliation in East Timor, 2005, 7; UN Commission on Human Rights, “Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission Resolution 1997/39. Addendum: Guiding Principles on Internal Displacement.”

²⁸⁴ A discussion on the other remedies that should be offered to the displaced persons will be presented in following sections.

reconciliation.²⁸⁵ Aiming at supporting this goal, the CAVR report stressed the importance of truth and accountability. It stated:

The Commission believes that for this new friendship to flourish the principles of acknowledging the truth of the past, accountability for violence, and a spirit of generosity in assisting those who have been harmed by that violence, are vital.²⁸⁶

More specifically, the report demanded that the Indonesian government declassifies the records of a number of alleged massacres and other events that resulted in mass killings and/or displacement available to the government of Timor-Leste and the international community.²⁸⁷

These three examples examined above of truth commission work on displacement share several elements that are consistent with the theoretical framework of truth commissions. They all served as tools for finding and declaring the truth about displacement as a human rights violation. In other words, they ended all forms of denial in relation to displacement, and acknowledged the plight of the victims. Furthermore, they were stepping stones to further redress of the victims. On the one hand, they recommended appropriate measures to redress displacement, and on the other hand, they gave their recommendations in relation to the question of accountability, either favouring amnesty as in the case of Liberia, or demanding prosecutions as was the case in Timor-Leste. But in all cases, the truth commissions were not seen as the only remedy for the plight of displacement, and it was always seen as a step toward meaningful redress.

5.3.2.1.3 Acknowledgment of Displacement through Truth in the Palestinian-Israeli Conflict

Israel's consistent denial of responsibility for the displacement and the approach of the peace process that prevented acknowledgment have been seen as an obstacle to peace by a number of observers. For example, the Palestinian intellectual Edward Said wrote in 1999 criticizing the Oslo peace process:

31. ²⁸⁵ Commission for Reception, Truth and Reconciliation in East Timor, *Part 11: Recommendations*,

²⁸⁶ Ibid.

²⁸⁷ Ibid., 33.

Oslo required us to forget and renounce our history of loss, dispossessed by the very people who have taught everyone the importance of not forgetting the past. Thus we are the victims of the victims, the refugees of the refugees.²⁸⁸

As noticed by Said, the demand to simply forget the past without any process of addressing its consequences is a continuation of victimization. Moreover, these types of human rights violations continued and increased throughout the peace process. This was pointed out as early as 1995 by Stanley Cohen, when the peace process was in its early stages and many people were hopeful that it would succeed. He wrote in his article exploring the potential of a transitional justice process:

[A]ll of the human rights violations from the “old days” continue in the West Bank and the edges of the autonomous areas: torture and ill treatment of detainees..., house demolitions, restrictions of movement (more severe than ever before) and, above all, extra judicial killings by IDF undercover units.²⁸⁹

Against this background, a number of authors examined the possibility of designing a truth commission in an endeavour to end the Palestinian-Israeli conflict. Probably because of the symbolic significance of the *Nakba* and the polarized debate on its history, most of these authors discussed utilizing truth commissions to find the truth about the 1948 displacement and foster reconciliation. For example, Ron Dudai wrote that while the Palestinian-Israeli debate about the refugees issue is focused on legal “arguments and counter-arguments regarding the Palestinian right of return,” and other technical issues,

It seems that without addressing the historical cause of the creation of the refugee problem, and measures of recognition, acknowledgment and apology by Israel (as well as addressing the role of Arab leaders in contributing and sustaining the suffering of the refugees), these legal and technical debates may not suffice to resolve the problem.²⁹⁰

²⁸⁸ Edward Said, “Truth and Reconciliation,” *Al-Ahram Weekly*, January 14, 1999, Issue No.412 edition, <http://weekly.ahram.org.eg/1999/412/op2.htm>.

²⁸⁹ Stanley Cohen, “Justice in Transition? Prospects for a Palestinian-Israeli Truth Commission,” *Middle East Report* no. 194/195, Odds against Peace (1995): 4.

²⁹⁰ Ron Dudai, “A Model for Dealing with the Past in the Israeli–Palestinian Context,” *International Journal of Transitional Justice* 1, no. 2 (July 1, 2007): 256.

In another publication, Dudai added that a transitional justice process related to the refugee issue should include reparations which should “not only include monetary compensation, but acts such as public apologies and commemoration.”²⁹¹

Similarly, Zinadia Miller considered the Palestinian refugees problem to be an appropriate topic for the investigation of a truth commission. She rightly argued that the polarized points of view about the mass displacement that took place during Israel’s birth in 1948 were mirrored in a legal discussion about the refugees’ right of return in international law.²⁹² Then she argued:

Yet, international law cannot encompass the full claims of the refugees, even if the right of return were to be recognized. The legal argument stands in for a host of psychological, historical, and narrative demands about acknowledgement and apology. A mechanism must be found that will circumvent the exclusively legalistic language of rights discourse and encompass the requirement of narrative, history, reparations and repair.²⁹³

In Miller’s view, a “commission of inquiry” is the right mechanism to address this problem. She argued that this commission would ideally “harmonize the varying accounts of 1948 and stimulate an Israeli apology for complicity in the experience of Palestinians.”²⁹⁴

Indeed, as noted by all these authors, the denial of the *Nakba* needs to stop, and transitional justice offers solutions. However, it must be stressed that Israel’s denial of responsibility over the *Nakba* is not the only form of denial in relation to displacement. As identified above, Israel exercises other important forms of denial. First, it conceals vital information such as numbers of victims or even the very laws that it uses to inflict displacement. Second, it blames the victim for his own misery which resulted from a discriminatory legal system.

Despite these forms of denial, it is important to mention that even under the current regimes that Israel runs, knowledge has been increasingly available, partly as a

²⁹¹ Ron Dudai, “‘Does Any of This Matter?’ Transitional Justice and the Israeli-Palestinian Conflict,” in *Crime, Social Control and Human Rights: From Moral Panics to States of Denial, Essays in Honour of Stanley Cohen*, ed. David Downes et al. (Willan, 2007), 345.

²⁹² Zinadia Miller, “Settling With History: A Hybrid Commission of Inquiry for Israel/Palestine,” *Harvard Human Rights Journal* 20 (2007): 305.

²⁹³ *Ibid.*, 305–6.

²⁹⁴ *Ibid.*, 322.

result of mechanisms within the regime itself. First, Israel declassified part of its archives which allowed for historians access to important sources of information related to 1948 war.²⁹⁵ As argued earlier,²⁹⁶ this declassification has resulted in a new stream of historiography in Israel which tells a different narrative from that of the state.²⁹⁷ Another important step that Israel took was enacting and enforcing its Freedom of Information Act which allowed human rights organizations to demand the knowledge of information that had been concealed for long.²⁹⁸

Despite these positive steps, however, Israel has still failed to acknowledge that these acts violated the rights of those who were harmed by them. Furthermore, it continues to dispute the historical narrative that argues that it intentionally displaced Palestinians during the 1948 war, despite the evidence in its own declassified archives. A truth seeking initiative can remedy this problem. Truth commissions are useful even in cases when the truth is known but not acknowledged. As Mohammad Bamyeh expressed:

Truth means not uncovering hidden secrets, but making audible (and thus part of the fabric of a common narrative) that which has been well-known for some time but could not be disclosed because of the restrictions imposed by the needs and inclinations of diplomatic language.²⁹⁹

Building on this notion, it could be argued that a potential truth commission in Israel/Palestine needs to seek a genuine acknowledgment. The lessons learnt from the case studies can inform what the role of a truth commission is and what contribution to justice it can make. First, the international experiences of truth seeking initiatives demonstrate how a transitional justice process not only cares about the content, but also about the context. Truth commissions tend to take into account a large number of individual incidents in order to look at the macro picture. A look at the macro picture has the benefit of allowing the community to draw conclusions not only about whether something happened, but also about why it happened. In this regard, the truth

²⁹⁵ A. Shlaim, "The Debate About 1948," *International Journal of Middle East Studies* 27, no. 3 (1995): 302.

²⁹⁶ See Chapter 2 sec. 2.2

²⁹⁷ Shlaim, "The Debate About 1948," 302.

²⁹⁸ See Chapter 3.

²⁹⁹ Mohammed A. Bamyeh, "Palestine: Listening to the Inaudible," *The South Atlantic Quarterly* 102, no. 4 (2003): 839.

commissions' style attempts to conceptualize a deeper look into the history in order to be able to recommend measures for the future. This macro picture usually establishes the links between the different events that might be looked at as independent problems in other approaches. This "truth" comes with the state's acknowledgment not only of the suffering of the victims, but also of its responsibility for this suffering and its duty to redress. All the examples of truth commissions above demonstrate how the state acknowledged the responsibility of the actions committed by the repressive regime. This acknowledgment can be expressed in the constitution, laws, declarations, as well as speeches.

The macro picture in the plight of those who were victims of displacement in the Palestinian-Israeli conflict is not the 1948 or 1967 exoduses alone, and not the continuous forcible displacements alone, but all the experiences and patterns of displacement combined. It is in all the laws, military orders, regulations and procedures that have forcibly displaced civilians, separated families, or prevented return whether by military force, status revocation based on discriminatory law or by failure to register a new-born child who was entitled to be registered. In addition, a holistic approach to knowing the truth would seek it on both sides of the green line that separates the territory on which Israel was established in the aftermath of the 1948 war and the OPT. Displacement has taken place in both sides of the green line and with similar tools. For example, as Chapter 2 explained, the *Prevention of Infiltration Law* that Israel enacted to prevent the return of the refugees who were displaced during the 1948 war³⁰⁰ was almost copied into the Prevention of Infiltration Military Orders that were enacted in the West Bank and Gaza after the 1967 war³⁰¹ to prevent those displaced by it from return. Similarly, the

³⁰⁰ *The Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954, Sefer Ha-Chukkim No. 16, of the 27th Av, 5714 (26th August, 1954), P. 160, 1954.*

³⁰¹ *Military Order Regarding Prevention of Infiltration (Gaza Strip and Northern Sinai) (No. 82) for 5727, 1967; Military Order Regarding Prevention of Infiltration (West Bank) (No. 106), of 5727, 1967; Military Order Regarding Prevention of Infiltration (Gaza Strip and Northern Sinai) (No. 290) for 5729, 1969; Military Order Regarding Prevention of Infiltration (West Bank) (Amendment No. 1) (No. 190) of 5782, 1967; Military Order Regarding Prevention of Infiltration (West Bank) (No. 125), of 5727, 1967; Military Commander for the Judea and Samaria, Military Order Regarding Prevention of Infiltration (Judea and Samaria)(No.329), 5729, 1969, English Translation is presented by HaMoked, available at: http://www.hamoked.org/files/2010/112300_eng.pdf; Commander of IDF forces in the Judea and Samaria*

denationalization of all non-Jews who were displaced by the 1948 war³⁰² was echoed by the denial of residency status to those who were displaced in the 1967 war.³⁰³

Once this truth is established, the transitional justice framework suggests that an acknowledgment of wrongdoing must be declared. It is important to establish who was responsible of the wrongdoing and who will carry the burden of responsibility afterwards. When acknowledgment is established redress is expected. Such redress needs to be as comprehensive as possible, and needs to cover the injustices that were articulated by truth commissions. Thus, once a recognition that displacement has been an intentional policy that aimed at altering the demographic balance in Israel and the OPT, policies to stop and repair the harm need to be put in place to announce a genuine end of an era of human rights violations coupled with denial. The following sections will discuss the other remedies that can be used to redress displacement.

5.3.2.2 The Question of Criminal Accountability

The factual analysis presented in Chapters 2 and 3, which included the different methods used by Israel to inflict forcible displacement upon the non-Jewish population in Palestine/ Israel has shown that these measures included war operations and regulatory engineering that started with the 1948 war and continued until today.³⁰⁴ The continuous displacement and the prevention of all those displaced from return is being possible by the combined efforts of a large number of persons in public offices, including government ministers, army and police officials as well as judges in military and civilian courts.³⁰⁵ Chapter 4 examined the crime of forced displacement and concluded that such crime exists as a war crime or a crime against humanity.³⁰⁶ It is a war crime when committed in an occupied territory and a crime against humanity if committed against any civilian population, but only if it was part of a widespread or systematic policy, regardless of

Area, *Military Order Regarding Prevention of Infiltration (Amendment No. 2) (Judea and Samaria)*(No. 1650) 5769-2009, 2009, An English translation is presented by HaMoked, available at: http://hamokeden.red-id.com/files/2010/112301_eng.pdf.

³⁰² See Chapter 2, sec. 2.2.2 above.

³⁰³ See Chapter 2, sec. 2.3.2 above.

³⁰⁴ See, Chapters 2 and 3.

³⁰⁵ See, Chapter 3.

³⁰⁶ See, Chapter 4.

whether this displacement took place in time of war or peace.³⁰⁷ When such crime is perpetrated, relevant authorities are expected to invoke individual criminal responsibility against the perpetrators and prosecute them.³⁰⁸

In the context of the theoretical and practical development of transitional justice the question of the accountability of perpetrators of human rights violations underwent polarized debates and practices. In a nutshell, there were two competing theories of justice that emerged in this discussion. The first is known as the “retributive justice” theory which argues that justice can be achieved only when criminals are punished.³⁰⁹ The second preferred “restorative justice,” stressing that justice is advanced by repairing the harm caused by human rights violations, and even involving the perpetrator in the restoration process.³¹⁰ To further understand this discussion in the context of the transitional justice framework, it is essential to review the historical incidences that utilized each of the two theories.

Although the practice of transitional justice is usually traced back to the post Second World War tribunals, its emergence as a field of study and practice is usually cited as the late 1980s and the 1990s when the world witnessed a number of regime changes in Latin America, Africa and Europe.³¹¹ The end of the dictatorship in Argentina is frequently

³⁰⁷ See, Chapter 4, sec. 4.3.1 above.

³⁰⁸ See, sec. 5.2.2 above.

³⁰⁹ Despite being an important element in the transitional justice debate, retributive justice is an old theory of justice that has been practiced universally. According to this theory, a person deserves punishment if he commits a criminal act. See, James P. Sterba, “Retributive Justice,” *Political Theory* 5, no. 3 (August 1, 1977): 349–362; For a good analysis on the theory of retributive justice and within the transitional justice framework, see, Jon Elster, “Retribution,” in *Retribution and Reparation in the Transition to Democracy*, ed. Jon Elster (Cambridge University Press, 2006), 33–56; See also, Clark, “The Limits of Retributive Justice Findings of an Empirical Study in Bosnia and Hercegovina”; Janine Natalya Clark, “The Three Rs: Retributive Justice, Restorative Justice, and Reconciliation,” *Contemporary Justice Review* 11, no. 4 (2008): 331–350.

³¹⁰ Charles Villa-Vicencio, “Restorative Justice,” in *Pieces of the Puzzle: Keywords on Reconciliation & Transitional Justice*, ed. Charles Villa-Vicencio, Erik Doxtader, and Richard Goldstone (African Minds, 2004); Michael Wenzel, Tyler G. Okimoto, and Kate Cameron, “Do Retributive and Restorative Justice Processes Address Different Symbolic Concerns?,” *Critical Criminology* 20, no. 1 (March 1, 2012): 25–44; Tyler G. Okimoto, Michael Wenzel, and N. T. Feather, “Beyond Retribution: Conceptualizing Restorative Justice and Exploring Its Determinants,” *Social Justice Research* 22, no. 1 (March 1, 2009): 156–180; Dennis Sullivan and Larry Tifft, *Handbook of Restorative Justice* (UK: Routledge, 2006); Declan Roche, “The Evolving Definition of Restorative Justice,” *Contemporary Justice Review* 4, no. 3–4 (2001): 341–354; Clark, “The Three Rs.”

³¹¹ In her widely cited paper, *Transitional Justice Genealogy*, Teitel divided the development of the concept of transitional justice into four phases. The first phase represented the developments that took

marked as a shifting point towards framing the field of transitional justice.³¹² The military dictatorship that ruled the country prior to the transition in Argentina committed a number of wide-scale systematic human rights violations including forced disappearance.³¹³ To address these violations, the new government sought a number of measures, including the prosecution of a number of leaders in the dictatorship junta and establishing special commissions of inquiry to find out information about the disappeared.³¹⁴ This truth was a needed remedy for the families of those who disappeared and the community as a whole, all of whom sought closure.

Another famous example is the widely cited transitional justice experience of South Africa. This country had suffered for decades from the Apartheid regime, which systematically applied racial discrimination, torture and many other policies that can be characterized as crimes against humanity.³¹⁵ In South Africa, the regime change took place in a negotiated agreement, rather than a clear victory of the anti-apartheid powers over the regime.³¹⁶ After this, free elections were held and the new post-apartheid South African government started to implement policies to address the wide range of injustices committed by the apartheid regime. One of these measures was the famous Truth and Reconciliation Commissions (hereinafter TRC), which adopted and practiced a pragmatic

place after the end of the Second World War, when prosecutions of perpetrators of international crimes were held. The second phase represented the period of 1980s and 1990s when several international experiences stressed on reparation rather than retribution. See, Teitel, "Transitional Justice Genealogy," 69–94; See also, Kai Ambos, Judith Large, and Marieke Wierda, eds., *Building a Future on Peace and Justice: Studies on Transitional Justice, Conflict Resolution and Development: The Nuremberg Declaration on Peace and Justice* (Springer, 2009), V.

³¹² Leebaw, "The Irreconcilable Goals of Transitional Justice," 99.

³¹³ Carlos Acuna, "Transitional Justice in Argentina and Chile: A Never Ending Story?," in *Retribution and Reparation in the Transition to Democracy*, ed. Jon Elster (Cambridge University Press, 2006), 209.

³¹⁴ Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31, no. 2 (2009): 323; Leebaw, "The Irreconcilable Goals of Transitional Justice," 99; Acuna, "Transitional Justice in Argentina and Chile: A Never Ending Story?," 206–38.

³¹⁵ Alex Boraine, "Truth and Reconciliation Commission in South Africa Amnesty: The Price of Peace," in *Retribution and Reparation in the Transition to Democracy*, ed. Jon Elster (Cambridge University Press, 2006), 299–300; Hayner, *Unspeakable Truths*, 27.

³¹⁶ Christopher Calvin, "Overview of the Reparations Program in South Africa," in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford University Press, 2006), 177–8, <http://www.oxfordscholarship.com.ezproxy.westminster.ac.uk/view/10.1093/0199291926.001.0001/acprof-9780199291922>; Antje du Bois-Pedain, *Transitional Amnesty in South Africa* (Cambridge University Press, 2007), 17.

principle: amnesty for perpetrators of human rights violations in return of full truth.³¹⁷ This principle was enshrined in the law legislated during the transitional period which states that the goal of the TRC was first to “establish as complete picture as possible of the causes, nature and extent of the gross violations of human rights...,”³¹⁸ and to “facilitate the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this act.”³¹⁹

The South African approach represents the pragmatism that characterised a number of transitional justice experiences when it comes to criminal prosecutions.³²⁰ This pragmatism was a result of decisions made by negotiators who preferred the transition over prosecution.³²¹ This was expressed by the South African judge Richard Goldstone who stated:

The decision to opt for a Truth and Reconciliation Commission was an important compromise. If the ANC [African National Congress, which led the resistance against apartheid and the negotiations to end it] had insisted on Nuremberg-style trials for the leaders of the former apartheid government, there would have been no peaceful transition to democracy, and if the former government had insisted on a blanket amnesty then, similarly, the negotiations would have broken down. A bloody revolution sooner rather than later would have been inevitable. The Truth and Reconciliation Commission is a bridge from the old to the new.³²²

The dilemma that Judge Goldstone has expressed here is one that almost every transitional society faces. Insisting on prosecuting perpetrators of human rights violations might hinder the transition to democracy and peace, and might cost more lives. Thus, in South Africa restorative justice was prioritized over retributive justice. The South African experience represented a phase in the development of transitional justice in which

³¹⁷ Amnesty to perpetrators of gross human rights violations was part of the agreement that brought forth the transition. Nonetheless, the transitional South African government introduced truth as a precondition to receiving amnesty. See, Bois-Pedain, *Transitional Amnesty in South Africa*, 17–19.

³¹⁸ *Promotion of National Unity and Reconciliation Act* 34, sec. 3(a).

³¹⁹ *Ibid.*, sec. 3(b).

³²⁰ Teitel, “Transitional Justice Genealogy,” 75–8.

³²¹ Hayner, *Unspeakable Truths*, 27; Boraine, “Truth and Reconciliation Commission in South Africa Amnesty: The Price of Peace,” 301–2.

³²² This statement was reportedly given at a lecture in New York University, and has been quoted by Boraine. See, Boraine, “Truth and Reconciliation Commission in South Africa Amnesty: The Price of Peace,” 302.

prosecutions were avoided by transitional states. Teitel explains that this phase of the development of transitional justice

reflected that the relevant values in the balance were hardly those of the ideal rule of law. Where the aim was to advance legitimacy, pragmatic principles guided the justice policy and the sense of adherence to the rule of law. Transitional jurisprudence was linked to a conception of justice that was imperfect and partial. What is fair and just in extraordinary political circumstances was to be determined from the transitional period itself.³²³

Hence, the South African experience represented the frequent inclination in that historical period not to be strict about the rule of law and criminal justice, in return for a more stable transition, and a hope for peaceful coexistence in the future.

Nevertheless, the development of the concept and practice of transitional justice did not stop at the South African experience. In the aftermath of the Cold War, the world witnessed the rise of international *ad hoc* tribunals in former Yugoslavia and Rwanda and a special court in Sierra Leone that prosecuted alleged perpetrators of genocide, war crimes and crimes against humanity.³²⁴ Furthermore, the International Criminal Court (ICC) was established to prosecute perpetrators of international crimes.³²⁵ These events certainly were a force that pulled the experiences of transitional justice back towards the general rule of law principles that govern individual criminal responsibility.³²⁶ In addition, the United Nations has played a major role in pushing transitional states towards not incorporating a blanket amnesty to everything that happened in the past and, as such,

³²³ Teitel, "Transitional Justice Genealogy," 76.

³²⁴ See generally, William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, 2006); See also, Jackson Maogoto, "The Experience of the Ad Hoc Tribunals for the Former Yugoslavia and Rwanda," in *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko: In Memoriam Professor Igor Pavlovich Blishchenko (1930-2000)*, ed. José Doria, Hans-Peter Gasser, and M. Cherif Bassiouni (Brill, 2009), 63–74; See also, Jose Doria, "The Work of the Special Court for Sierra Leone Through Its Jurisprudence," in *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko: In Memoriam Professor Igor Pavlovich Blishchenko (1930-2000)*, ed. José Doria, Hans-Peter Gasser, and M. Cherif Bassiouni (Brill, 2009), 230–54.

³²⁵ See generally, Schabas, *An Introduction to the International Criminal Court*.

³²⁶ Teitel argues that the ad hoc tribunals and the establishment of the international criminal court was a new "phase" in the development of transitional justice. Unlike the experiences where countries gave blanket amnesties, in the new phase prosecution of perpetrators of grave human rights violations became again an important element in any transition. See, Teitel, "Transitional Justice Genealogy," 89–92.

providing impunity for perpetrators of international crimes.³²⁷ In a number of cases, the United Nations representatives incorporated a disclaimer into peace agreements that provided amnesties stating: “The United Nations does not recognize amnesty for genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.”³²⁸

Hence, the relationship between the transitional justice framework and traditional international law is dialectical in relation to criminal justice. For the better or worse, this provides transitional societies with a diversity of policy options to choose from, depending on their circumstances.

This contrast between transitional societies seeking retributive justice and others preferring to peruse reparative justice was also reflected on addressing forced displacement. As explained in Chapter 4, the crime of forced displacement was condemned as a war crime and a crime against humanity by every international judicial body that was created since the Second World War. Furthermore, a number of countries like Colombia and Estonia, for example, prosecuted alleged perpetrators of forced displacement in their domestic legal systems. In the following sub-sections, we will examine, first, the International Tribunal in former Yugoslavia, and its role on the transition in Bosnia as an example of international prosecution of forced displacement. Secondly, Colombia and Estonia will be examined as examples of prosecuting deportation within the domestic legal system.

5.3.2.2.1 An example of international tribunal prosecuting forced displacement: Bosnia and Herzegovina

The conflict in former Yugoslavia, a European federation which ended up being divided into several states, was characterized by ethnic and religious divisions, which were translated into ugly massacres, forced displacement and genocide.³²⁹ Forced displacement

³²⁷ United Nations General Assembly, “Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: Analytical Study on Human Rights and Transitional Justice” (A/HRC/12/18, August 6, 2009), paras. 53–4.

³²⁸ Ibid., para. 53.

³²⁹ See generally, Steven L. Burg and Paul S. Shoup, *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention* (M.E. Sharpe, 2000).

was an important element of the conflict which, as expressed by Jonna Korner, involved the objective of “creating ethnically pure territories.”³³⁰ The transition out of this conflict took place after the spread of great violence and atrocities, followed by international military intervention.³³¹ The end of the Cold War that restricted the work of the UN for almost half a century helped the UN Security Council to intervene militarily and change the balance of power in the conflict.³³² This has been reflected by the options taken for transitional justice.

The international community was shocked by what came to be known as “ethnic cleansing” activities that took place during the conflict, aiming at changing the demographic composition of several areas as the federation was breaking into several independent republics.³³³ In addition, Europe felt burdened by the number of refugees who flooded into the continent, which formed an additional incentive for them to encourage the implementation of the right of all refugees to return to their homes and have their properties resituated.³³⁴ It was clear early on that ethnic cleansing was being widely practiced in the Yugoslavian conflict which led the UN Security Council in 1992 to call upon all parties “to ensure that forcible expulsions of persons from the areas where they live and any attempts to change the ethnic composition of the population... cease immediately.”³³⁵ As a result, the UN Commission on Human Rights established the position of a Special Rapporteur on Human Rights, who reported about the crimes that were taking place during the armed conflict.³³⁶ In addition, the UN Secretary General

³³⁰ Joanna Korner, *Criminal Justice and Forced Displacement in the Former Yugoslavia*, Case Studies on Transitional Justice and Displacement (ICTJ and Brookings-LSE Project on Internal Displacement, July 2012), 6.

³³¹ Bell, *Peace Agreements and Human Rights*, 105.

³³² Roht-Arriaza Naomi, “The Role of International Actors in National Accountability Processes,” in *The Politics of Memory and Democratization: Transitional Justice in Democratizing Societies: Transitional Justice in Democratizing Societies*, ed. Alexandra Barahona De Brito, Carmen Gonzalez Enriquez, and Paloma Aguilar (Oxford University Press, 2001), 56.

³³³ Bell, *Peace Agreements and Human Rights*, 98–117; Korner, *Criminal Justice and Forced Displacement in the Former Yugoslavia*, 6–7.

³³⁴ Rhodri C. Williams, “The Contemporary Right to Property Restitution in the Context of Transitional Justice,” *International Center for Transitional Justice*, Occasional Paper Series (May 2007): 33; Korner, *Criminal Justice and Forced Displacement in the Former Yugoslavia*, 6.

³³⁵ UN Security Council, “Resolution 752,” May 15, 1992, para. 6.

³³⁶ Bell, *Peace Agreements and Human Rights*, 106.

appointed a special impartial commission of experts to investigate the crimes.³³⁷ As a result of the way the transition took place, an ad hoc tribunal known as the International Criminal Tribunal for Former Yugoslavia (ICTY) was founded by the United Nations Security Council to prosecute those most responsible of the atrocities that took place during the conflict.³³⁸

The tribunal worked actively within a jurisdiction that included the crime of forced displacement, termed as “deportation and forcible transfer” as war crimes and crimes against humanity, echoing the universal standards that were exercised in the Nuremberg trials.³³⁹ Forcible displacement was, indeed, one of the most important crimes committed during the conflict,³⁴⁰ which resulted in the ICTY prosecuting a number of those accused of this crime.³⁴¹ In fact, the ICTY has actively developed the parameters of the crimes of “deportation” and “forcible transfer” which influenced the international legal system as a whole.³⁴² As argued by Dawson and Farber,

The tribunal has enabled the forcible displacements of several armed conflicts to be placed under the magnifying glass of judicial scrutiny and has advanced a “system” of international law through the development of legal standards applicable to the age-old phenomenon of forcible displacement. ICTY has provided a unique opportunity for the international community to define the elements of

³³⁷ Ibid.

³³⁸ UN Security Council, “Resolution 808,” February 22, 1993, U.N. Doc. S/RES/808; UN Security Council, “Statute of the International Tribunal for the Prosecution of the Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991”; As noticed by Korner, this tribunal was established while the conflict was still ongoing. See, Korner, *Criminal Justice and Forced Displacement in the Former Yugoslavia*, 7.

³³⁹ UN Security Council, “Statute of the International Tribunal for the Prosecution of the Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991”, Articles 2(g) and 5(d).

³⁴⁰ Carl Dahlman and Gearóid Ó Tuathail, “The Legacy of Ethnic Cleansing: The International Community and the Returns Process in post-Dayton Bosnia–Herzegovina,” *Political Geography* 24, no. 5 (June 2005): 574–8; Korner, *Criminal Justice and Forced Displacement in the Former Yugoslavia*, 6; Bell, *Peace Agreements and Human Rights*, 98–117.

³⁴¹ See, for example, Prosecutor v. Milomir Stakic Appeals Judgment (ICTY 2006); See also, Prosecutor v. Vlastimir Dordevic Trial Judgment (ICTY 2011); See also, Prosecutor v. Momcilo Krajisnik (Appeal Judgment) (ICTY 2009); See also, Prosecutor v. Milan Martić Trial Judgment (ICTY 2007); See also, ICTY, Prosecutor v. Blagojevic and Jokic (Trial Judgment) (ICTY 2005); See also, ICTY, Prosecutor v. Milorad Krnojelac (Trial Judgment) (ICTY 2002).

³⁴² This was discussed in more detail in Chapter 4, sec. 4.3.1.

forcible displacement, not in an academic vacuum but rather in relation to actual factual events.³⁴³

Hence, in the punishing vs. pardoning dilemma in transitional justice, the first won utilizing the traditional retributive justice approach. Thus, from a retributive justice perspective, rule of law was significantly advanced by holding those responsible of the most severe human rights violations accountable to their actions.³⁴⁴

However, from a restorative justice perspective, the contribution of prosecution was arguably small, although not non-existing. One of the functions of public trials is that they reveal some truth, which means that already with the prosecution of perpetrators of international crimes the issue of truth was partly addressed.³⁴⁵ However, there is major difference between criminal prosecutions and truth commissions as truth-seeking initiatives that also creates a need for the latter: the role of the victim.³⁴⁶ Criminal prosecutions are, by definition, focused on the accused person, trying to find the facts that would convict or acquit him and, as such, the victims have a limited role.³⁴⁷ Truth commissions are usually designed in order to contribute in victim satisfaction and are seen as healing processes, and provide a significant attention to the narrative of the victim.³⁴⁸ Keen to addressing the need for healing truth-telling initiatives, a number of Bosnian NGOs started lobbying for a Truth and Reconciliation Commission in 1997.³⁴⁹ While this was resisted first by the ICTY fearing it might interrupt its mandated work, it was later agreed to officially form a truth commission.³⁵⁰ This commission was later dissolved

³⁴³ Grant Dawson and Sonia Farber, *Forcible Displacement Throughout the Ages: Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Martinus Nijhoff Publishers, 2012), 103.

³⁴⁴ Korner, *Criminal Justice and Forced Displacement in the Former Yugoslavia*, 11.

³⁴⁵ Leebaw, "The Irreconcilable Goals of Transitional Justice," 96; Korner, *Criminal Justice and Forced Displacement in the Former Yugoslavia*, 13.

³⁴⁶ See sec. 5.3.1 above

³⁴⁷ Clark, "The Limits of Retributive Justice Findings of an Empirical Study in Bosnia and Herzegovina," 240.

³⁴⁸ Hayner, *Unspeakable Truths*, 22; Clark, "The Limits of Retributive Justice Findings of an Empirical Study in Bosnia and Herzegovina," 480.

³⁴⁹ N. Zupan, "Facing the Past and Transitional Justice in Countries of Former Yugoslavia," *Working Group Development and Peace, Bonn* (2005): 333, http://www.berghof-conflictresearch.org/documents/publications/dayton_zupan_rec.pdf; Hayner, *Unspeakable Truths*, 111–3.

³⁵⁰ Zupan, "Facing the Past and Transitional Justice in Countries of Former Yugoslavia," 333; Hayner, *Unspeakable Truths*, 111–3.

without researching the issues in its mandate or writing any reports. Therefore, the truth commission experience in Bosnia was an incomplete and the only redress in the question on truth was provided by the ICTY. Nonetheless, Bosnia is currently witnessing a debate in which human rights organizations and transitional justice experts are demanding the establishment of a truth commission that will establish the facts in a non-judicial methodology.³⁵¹ The Bosnian academic and transitional justice expert Goran Simic argued:

Seventeen years after the war we still do not have all the facts about the war and we must make an effort to get them. This is evident when we look at our past and realize that [in this region] we have a war every 50 years and have so far wasted 17 years of peace doing nothing.³⁵²

Simic's fear of the return of war in the republics of former Yugoslavia stems from his belief that retributive justice is not sufficient to advance peace and reconciliation. Despite the fact that prosecutions reveal some truth, advocates of restorative justice continue to demand a more holistic approach to solve the problem of displacement and eventually help the refugees and IDPs to return to their homes in safety and dignity. As argued by Bradley, truth commissions have the potential of "challenging ethno-nationalist myths" that caused the violence in the first place, allowing for a safe and dignified return for the refugees back to their homes.³⁵³ However, as will be shown in the reparations section, the Bosnian case has offered more remedies to the victims than just holding the criminals accountable.

³⁵¹ Denis Dzidic, "Interview – Goran Simic: No Peace Without Transitional Strategy," *BIRN BiH*, December 19, 2012, <http://www.bim.ba/en/353/10/36388/>; Denis Dzidic, "Bosnia's Transitional Justice Strategy Requires Political Support," *TransConflict*, October 9, 2012, <http://www.transconflict.com/2012/10/bosnias-transitional-justice-strategy-requires-political-support-090/>; Mirza Ajnadzic and Ajdin Kamber, "Bosnia: Daunting Task of Confronting the Past," *Sarajevo Center for Contemporary Art*, accessed April 5, 2013, <http://www.pro.ba/en/suocavanje-s-prosloscu-tezak-zadatak-za-bih/>; Graeme Simpson, Edin Hodzic, and Louis Bickford, *Looking Back, Looking Forward: Promoting Dialogue Through Truth-Seeking in Bosnia and Herzegovina* (Sarajevo: UNDP- Justice and Human Security, June 26, 2012), <http://www.undp.ba/index.aspx?PID=36&RID=141>; United Nations Development Program, "UNDP Bosnia and Herzegovina - Consultations on Truth-Telling and Memorialisation in the Brcko District of Bosnia and Herzegovina," *UNDP Website*, February 12, 2013, <http://www.undp.ba/index.aspx?PID=7&RID=813>.

³⁵² Dzidic, "Interview – Goran Simic: No Peace Without Transitional Strategy."

³⁵³ Bradley, "Truth-Telling and Displacement: Patterns and Prospects," 218–9.

5.3.2.2.2 Examples of domestic prosecution of forced displacement: Colombia and Estonia

In addition to being prosecuted in international tribunals, forced displacement has also been condemned and prosecuted in some domestic jurisdictions. One significant example of a state that introduced the crime of forced displacement in its penal code is Colombia.³⁵⁴ In this Latin American country, a decades-long armed conflict between the state and a number of guerrillas has resulted in millions of displaced Colombians most of whom were displaced within the borders of the state.³⁵⁵ A significant response that was introduced to combat displacement in Colombia has been incorporating the duty to prosecute perpetrators of the crime of forcible displacement into the domestic penal law of Colombia.³⁵⁶ This law was used both for displacements that happened after the adoption of the law and the ones that had been committed before.³⁵⁷ When the retrospective application of the law was challenged in the Supreme Court, it found that the act of forced displacement had been already a crime prior to the adoption of the domestic act, since International Law had already condemned it.³⁵⁸

A similar situation took place in Estonia an Eastern European state that took its independence from the Soviet Union in 1992.³⁵⁹ In 1994, the Estonian “Criminal Code” (*Kriminaalkodeks*) was amended to include a chapter that condemns war crimes and

³⁵⁴ Colombia, *Law 589 of 2000, Criminal Code*, 2000.

³⁵⁵ Elizabeth Kerr, “Forced Displacement in Colombia: a Crime and a Humanitarian Tragedy,” *Colombia*, January 2010, 3–8; Roberto Vidal-Lopez, *Truth Telling and Internal Displacement in Colombia*, Case Studies on Transitional Justice and Displacement (ICTJ and Brookings-LSE Project on Internal Displacement, July 2012), 4–8; Lisa Laplante and Kimberly Theidon, “Transitional Justice in Times of Conflict: Colombia’s Ley de Justicia y Paz,” *Michigan Journal of International Law* 28, no. 1 (2006): 56–7; Global IDP Database, *Profile of Internal Displacement: Colombia* (Geneva, n.d.), 7–8.

³⁵⁶ Colombia, *Law 589 of 2000*; Federico Andreu-Guzman, *Criminal Justice and Forced Displacement in Colombia*, Case Studies on Transitional Justice and Displacement (ICTJ and Brookings-LSE Project on Internal Displacement, July 2012), 8–9; Federico Andreu-Guzman, “Criminal Justice and Forced Displacement: International and National Perspectives,” in *Transitional Justice and Displacement*, ed. Roger Duthie, Advancing Transitional Justice 5 (Social Science Research Council, 2012), 250; Global IDP Database, *Profile of Internal Displacement: Colombia*, 176.

³⁵⁷ Federico Andreu-Guzman, *Criminal Justice and Forced Displacement in Colombia*, 9.

³⁵⁸ *Ibid.*, citing Supreme Court of Justice, Criminal Cassation Chamber, Case No. 33.118, against Cesar Pérez García, Decision of May 13, 2010.

³⁵⁹ Toivo Miljan, *Historical Dictionary of Estonia* (Scarecrow Press, 2004), 31–3.

crimes against humanity, including the crime of deportation.³⁶⁰ In 2001, the Estonian Parliament adopted a new “Penal Code” (*Karistusseadustik*) replacing the previous “Criminal Code” which condemned forced displacement as both a war crime and a crime against humanity punishable by the domestic law.³⁶¹ In 2003, a Russian and an Estonian were convicted by a local court with committing deportation as a crime against humanity back in 1949.³⁶² They appealed their conviction at the European Court of Human Rights (ECHR) arguing that deportation was not a crime according to the criminal law of Estonia in 1949, and that the retrospective application of a criminal rule was contrary to the principles of legality.³⁶³ The ECHR rejected their appeal on the basis that the crime of deportation as a crime against humanity had been considered a crime since the Nuremburg trials.³⁶⁴ Furthermore, the court noted that the UN General Assembly adopted a resolution in 1946³⁶⁵ affirming the principles of international law recognized by the Charter of the Nuremburg Trials.³⁶⁶ According to the court, this affirmation, in addition to the International Law Commission’s adoption of the Nuremburg principles,³⁶⁷ meant that the “responsibility for crimes against humanity cannot be limited only to the

³⁶⁰ Article 61-1 (1) of the code condemns “deportation and expulsion” as a crime against humanity. Estonia, *Criminal Code*, RT 1992, 20, 287 Ja 288, 1992.

³⁶¹ The Estonian Penal Code defined a number of acts as war crimes. In Article 97, entitled “Attack Against Civilians” it provided: “A person who kills, tortures, causes health damage to, rapes, compels to serve in the armed forces or participate in military operations of a hostile state, takes hostage, illegally deprives of liberty or deprives of the right to fair trial a civilian in a war zone or in an occupied territory, or displaces residents of an occupying state in an occupied territory, or displaces residents of an occupied territory, shall be punished by 6 to 20 years’ imprisonment.” In Article 89, it provided for a punishment for “Crimes Against Humanity.” It stated: “Systematic or large-scale deprivation or restriction of human rights and freedoms, instigated or directed by a state, organisation or group, or killing, torture, rape, causing health damage, forced displacement, expulsion, subjection to prostitution, unfounded deprivation of liberty, or other abuse of civilians, is punishable by 8 to 20 years’ imprisonment or life imprisonment.” See, Estonia, *Penal Code*, RT I 2001, 61, 364; *Consolidated Text RT I 2002, 86, 504*, 2001.

³⁶² Kolik and Kislyiy vs. Estonia, nos. 23052/04 and 24018/04 (European Court of Human Rights 2006).

³⁶³ *Ibid.*, 7.

³⁶⁴ *Ibid.*, 8.

³⁶⁵ UN General Assembly, “Resolution 95(I),” December 11, 1946.

³⁶⁶ Kolik and Kislyiy vs. Estonia, nos. 23052/04 and 24018/04, 8–9 (European Court of Human Rights 2006), 8–9.

³⁶⁷ *Principles of International Law Recognized in the Charter of the Nuremburg Tribunal and in the Judgment of the Tribunal*, Yearbook of the International Law Commission, 1950, UN Doc. No. A/316 (A/5/12).

nationals of certain countries and solely to acts committed within the specific time frame of the Second World War.”³⁶⁸ Eventually, the court concluded:

The Court notes that even if the acts committed by the applicants could have been regarded as lawful under the Soviet law at the material time, they were nevertheless found by the Estonian courts to constitute crimes against humanity under international law at the time of their commission. The Court sees no reason to come to a different conclusion.³⁶⁹

Hence, the ECHR upheld the Estonian court’s decision and saw that the condemnation of the crime of deportation as far back as 1949 was in line with international law.

What can be learnt from both examples is that when a state enters a transitional period, the crime of forced displacement can be introduced to its domestic legal system to prosecute not only future deportations and transfers but also ones that happened in the past. This would not be considered a violation of the principles of legality because international law clearly condemned and prosecuted this crime since the end of the Second World War. Furthermore, these two examples reinforce the conclusion that for war crimes and crimes against humanity there is no statute of limitations and that the crime of forced displacement was part of customary international law as early as 1949.

5.3.2.2.3 Accountability for forced displacement in the Palestinian-Israeli Conflict

Unfortunately, the two regimes run by the Israeli legal system (the Civil and Military regimes) have never treated the forced displacement of Palestinian civilians as a crime. On the contrary, as explained in Chapters 2 and 3, the Israeli legal system has been utilized as a tool for deporting and transferring Palestinians since the establishment of the state until the current day.³⁷⁰ Furthermore, the peace process has not, thus far, adopted any form of condemnation to the displacement problem, not to mention any the accountability of the perpetrators.

³⁶⁸ Kolik and Kislyiy vs. Estonia, nos. 23052/04 and 24018/04, 9 (European Court of Human Rights 2006), 9.

³⁶⁹ Ibid.

³⁷⁰ As argued by Bletter, impunity applies for all Israeli perpetrators of gross human rights violations. See, Gloria Bletter, “Israel’s Impunity Under International Law,” *Peace Review* 15, no. 1 (2003): 3–9; See also, Human Rights Watch, *Promoting Impunity: The Israeli Military’s Failure to Investigate Wrongdoing* (Human Rights Watch, June 2005).

Nonetheless, the issue of accountability for human rights violations has been an issue of debate for a number of years. Especially since the increase in the rate of war crimes and crimes against humanity committed in the OPT after the beginning of the Second Palestinian Intifada in 2000, attempts to seek remedies from international legal and judicial forums increased.³⁷¹ For example, there were attempts to prosecute alleged Israeli war criminals using universal jurisdiction in Belgium,³⁷² the United Kingdom³⁷³ and Spain,³⁷⁴ but none of these endeavours was successful.

In December 2008, Israel waged a three-week military operation on the Gaza Strip (known as Operation Cast Lead) during which 1419 Palestinians were killed, 82.2% of whom were civilians.³⁷⁵ Among the large number of civilian deaths, 318 children and 111 women were killed.³⁷⁶ Furthermore, the attack resulted in the injury of thousands of civilians, the total or partial destruction of thousands of houses, schools, factories, farms and other civilian and economic facilities including water and sewage networks.³⁷⁷ One third of the population of Gaza Strip was forced to evacuate their homes because of the

³⁷¹ John Reynolds and Michael Kearney, *Palestine, and the Politics of International Criminal Justice*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, June 1, 2012), 2, 5, <http://papers.ssrn.com/abstract=2071138>.

³⁷² Badil Resource Center for Palestinian Residency and Refugee Rights, "War Crimes: The Case Against Ariel Sharon," *Badil*, September 2001, <http://www.badil.org/en/al-majdal/item/1143-war-crimes-the-case-against-ariel-sharon>; The Associated Press and Haaretz, "Belgium's Highest Court Throws Out Case Against Sharon," *Haaretz.com*, September 24, 2003, <http://www.haaretz.com/news/belgium-s-highest-court-throws-out-case-against-sharon-1.101075>; "Belgium Opens Way for Sharon Trial," *BBC*, January 15, 2003, sec. Europe, <http://news.bbc.co.uk/1/hi/world/europe/2662635.stm>.

³⁷³ Michael Mansfield, "Sleep Easy, War Criminals," *The Guardian*, October 7, 2011, sec. Comment is free, <http://www.guardian.co.uk/commentisfree/2011/oct/07/israel-tzipi-livni>; "Universal Jurisdiction - Press Releases - Inside Government - GOV.UK," accessed April 11, 2013, <https://www.gov.uk/government/news/universal-jurisdiction>; Ian Black and Ian Cobain, "British Court Issued Gaza Arrest Warrant for Former Israeli Minister Tzipi Livni," *The Guardian*, December 14, 2009, sec. World news, <http://www.guardian.co.uk/world/2009/dec/14/tzipi-livni-israel-gaza-arrest>; Daniel Machover, "Arrest Warrant Plans Make a Mockery of Universal Jurisdiction," *The Guardian*, March 30, 2011, sec. Comment is free, <http://www.guardian.co.uk/commentisfree/2011/mar/30/coalition-criminal-justice-universal-jurisdiction>.

³⁷⁴ Giles Tremlett, "Spain Investigates Claims of Israeli Crimes Against Humanity in Gaza," *The Guardian*, January 29, 2009, sec. World news, <http://www.guardian.co.uk/world/2009/jan/29/spain-israel-gaza-crimes-humanity>.

³⁷⁵ Palestinian Centre for Human Rights, *Targeted Civilians: APCHR Report on the Israeli Military Offensive Against the Gaza Strip (27 December 2008- 18 January 2009)* (Gaza: PCHR, October 21, 2009), 9, http://www.pchrgaza.org/files/Reports/English/pdf_spec/gaza%20war%20report.pdf.

³⁷⁶ *Ibid.*

³⁷⁷ *Ibid.*, 9–14.

intensity of the attacks and as a result of Israeli army instructions ordering them to evacuate the areas “for their own safety.”³⁷⁸ In the aftermath of this war, the UN Human Rights Council (HRC) adopted a resolution that condemned the Israeli attack³⁷⁹ and decided to dispatch a fact-finding mission to document Israeli human rights and IHL violations.³⁸⁰ In April 2009, the HRC established the mission and appointed the former South African judge and the chief prosecutor of the ICTY and ICTR Richard Goldstone³⁸¹ to head it with the mandate

to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after.³⁸²

The report of the mission, generally known as the “Goldstone Report,” documented a number of war crimes and possible crimes against humanity committed during the operation in Gaza and concluded that these crimes invoke individual criminal responsibility.³⁸³ Furthermore, the report recommended that the UN Security Council require the Israeli government to investigate the alleged crimes and prosecute those responsible of them.³⁸⁴ Moreover, the report recommended that, in the absence of good faith from the government of Israel, the UN Security Council should “refer the situation in Gaza to the Prosecutor of the International Criminal Court.”³⁸⁵

During and after this war, the voices calling for holding those responsible for war crimes and crimes against humanity accountable in front of the ICC were rising. In January 2009, Palestinian authority initiated an endeavour to give the ICC jurisdiction over the OPT by depositing a declaration at the court recognizing “the jurisdiction of the Court for the

³⁷⁸ Ibid., 13–4.

³⁷⁹ UN Human Rights Council, “Resolution 9/1,” January 12, 2009, para. 1, UN. Doc. A/HRC/S-9/L.1.

³⁸⁰ Ibid., para. 14.

³⁸¹ UN Human Rights Council, *Richard J. Goldstone Appointed to Lead Human Rights Fact-Finding Mission on Gaza Conflict*, Press Release (Geneva: UN Human Rights Council, April 3, 2009), para. 1935–1966, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8469&LangID=E>.

³⁸² UN Human Rights Council, *Richard J. Goldstone Appointed to Lead Human Rights Fact-Finding Mission on Gaza Conflict*.

³⁸³ UN Human Rights Council, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict* (Geneva: UN Human Rights Council, September 25, 2009), UN Doc. A/HRC/12/48.

³⁸⁴ Ibid., 1969.

³⁸⁵ Ibid., para. 1969 (c).

purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002.”³⁸⁶ This declaration was in conformity with Article 12 (3) of the Rome statute which allows for states which are not parties to the Rome Statute to accept the statute’s jurisdiction.³⁸⁷ In light of this declaration, the ICC Prosecutor’s office determined that before investigating the alleged crimes, the office needed to “conduct a preliminary examination to consider all issues pertaining to its jurisdiction and to the admissibility of cases potentially arising from the situation.”³⁸⁸ Of special concern to the Prosecutor’s office was to determine whether the Palestinian declaration “meets the statutory requirements” to provide jurisdiction to the ICC over Palestine, including the question “whether Palestine qualifies as a ‘State’ for the purpose of article 12(3).”³⁸⁹ This question became the subject of a polarized discussion represented in submissions to the ICC Prosecutor’s office as well as in the academic sphere.³⁹⁰ The discussion involved the question whether Palestine was a state for the purpose of Article 12(3) of the Rome Statute; whether the ICC prosecutor has the capacity to determine an answer to this question and whether the whole question of determining statehood was relevant to the ICC jurisdiction.³⁹¹ At the end of this almost three-year discussion, the Office of the Prosecutor issued a decision declaring that it was beyond its capacity to determine whether Palestine was a state and that such capacity was vested in

³⁸⁶ Ali Khashan, Palestinian Minister of Justice, “Declaration Recognizing the Jurisdiction of the International Criminal Court,” January 21, 2009, Available at: <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>.

³⁸⁷ UN General Assembly, “Rome Statute of the International Criminal Court,” Article 12(3).

³⁸⁸ Beatrice Le Fraper du Hellen, Director of the Jurisdiction, Complementarity and Cooperation Division, ICC Prosecutor Office to Kyung-Wha Kang, Deputy High Commissioner for Human Rights, UNHCHR, “Letter to the UN High Commissioner on Human Rights,” January 12, 2010, para. 2, <http://www.icc-cpi.int/NR/rdonlyres/FF55CC8D-3E63-4D3F-B502-1DB2BC4D45FF/281439/LettertoUNHC1.pdf>.

³⁸⁹ The Office of the Prosecutor, *Report on Preliminary Examination of Activities* (The Hague: ICC, December 13, 2011), para. 17, <http://www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPreportonPreliminaryExaminations13December2011.pdf>.

³⁹⁰ The Office of the Prosecutor, *Situation in Palestine: Summary of Submissions on Whether the Declaration Lodged by the Palestinian National Authority Meets Statutory Requirements* (The Hague: ICC, May 3, 2010), <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/282852/PALESTINEFINAL201010272.pdf>; Michael Kearney, *Palestine and the International Criminal Court: Asking the Right Question*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, July 3, 2010), <http://papers.ssrn.com/abstract=1633975>.

³⁹¹ The Office of the Prosecutor, *Situation in Palestine: Summary of Submissions on Whether the Declaration Lodged by the Palestinian National Authority Meets Statutory Requirements*, 1–2.

the Secretary General of the United Nations, the UN General Assembly or the Assembly of State Parties to the Rome Statute.³⁹² Finally, the decision of the Prosecutor's Office declared:

The Office could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue relevant to an assessment of article 12 or should the Security Council, in accordance with article 13(b), make a referral providing jurisdiction.³⁹³

Hence, while the ICC prosecutor refused to immediately exercise jurisdiction based on the argument that he was not in a position to determine the status of Palestine, the door was left open to exercise the Court's jurisdiction once the statehood question was resolved in another forum.

Indeed, in December 2012, the UN General Assembly decided to "accord to Palestine non-member observer State status in the United Nations."³⁹⁴ Based strictly on the declaration of the ICC prosecutor, this status that Palestine acquired in the UN is sufficient to grant the ICC jurisdiction on the territory of this state. This situation is unprecedented in the Palestinian-Israeli Conflict during which no executive measures were ever taken by any international institution to punish or even stop crimes against humanity and war crimes related to the conflict. As argued by Kearney and Reynolds, the main reason behind the long-standing barrier that prevented the Palestinians from using the international legal framework as a refuge has been the atmosphere of impunity that unconditional western, most importantly US, support for Israel in international forums.³⁹⁵ Nonetheless, the recognition of Palestine as a state by the UN General Assembly has the potential of changing this impunity, should justice be sought at the ICC.

³⁹² ICC- The Office of the Prosecutor, "Situation in Palestine," April 3, 2012, para. 5–6.

³⁹³ Ibid., para. 8.

³⁹⁴ UN General Assembly, "Resolution 67/19," November 29, 2012, para. 2.

³⁹⁵ Reynolds and Kearney, *Palestine, and the Politics of International Criminal Justice*.

In fact, the Palestinian Authority itself is facing a tremendous amount of pressure to refrain from referring any case to the ICC.³⁹⁶ In April 2013, the chief Palestinian negotiator, Saeb Erekat, published a study that suggested:

In case the Israeli government starts building in the E1, Giv'at Ha-Matos or Ramat Shlomo settlements, the State of Palestine must refer the whole issue [of settlement building] to the ICC.³⁹⁷

Furthermore, Erekat divided the international treaties and conventions that the State of Palestine must join into conventions of “immediate priority,” and others of “a priority within a period of six months” and finally the “long-term priorities.”³⁹⁸ According to Erekat’s study, joining the Rome Statute ICC was to be considered long-term priority commenting briefly that “this issue is complicated. Teams of international experts are still studying all its aspects.”³⁹⁹ What can be understood from this categorization and brief comment is that the Palestinian government is not planning to join the Rome Statute any time soon, and will only use it as a political tool, should Israel construct any of the three colonies mentioned in his study.⁴⁰⁰ However, human rights organizations have started

³⁹⁶ Chris McGreal, “International Criminal Court Is a Lever for Palestinians on Israeli Settlements,” *The Guardian*, December 15, 2012, sec. Comment is free, <http://www.guardian.co.uk/commentisfree/2012/dec/15/international-criminal-court-lever-palestinians>; The Daily Star, “France Warns Palestinians Against Taking Israel to ICC,” *The Daily Star Newspaper - Lebanon*, November 28, 2012, <http://www.dailystar.com.lb/News/Middle-East/2012/Nov-28/196418-france-warns-palestinians-against-taking-israel-to-icc.ashx>; DAWN.COM, “Palestinians Urged to Resist US, UK Pressure,” *DAWN.COM*, December 1, 2012, <http://dawn.com/2012/12/01/palestinians-urged-to-resist-us-uk-pressure/>; Jasmine Omeke, “The International Criminal Court’s Recent Role in Israeli-Palestinian Conflict,” *Harvard International Review*, February 10, 2013, <http://hir.harvard.edu/blog/jasmine-omeke/the-international-criminal-courts-recent-role-in-israeli-palestinian-conflict>; Al-Akhbar English, “Palestinians Facing ‘Intensive Pressure’ Not to Sue Israel,” *Al Akhbar English*, November 28, 2012, <http://english.al-akhbar.com/content/palestinians-facing-intensive-pressure-not-sue-israel>; Danielle Spiegel Feld, “Can Kerry Keep The Palestinians Out Of The ICC?,” *The Daily Beast*, March 27, 2013, <http://www.thedailybeast.com/articles/2013/03/27/can-kerry-keep-the-palestinians-out-of-the-icc.html>.

³⁹⁷ Until writing this thesis, this study has been only available in Arabic news agencies. See, Al-Quds Newspaper, “Erekat: If Israel Starts Building E1 and Giv’at Ha-Matos We Will Turn to the ICC,” *Al-Quds Newspaper*, April 6, 2013, <http://www.alquds.com/news/article/view/id/428704#.UWmGEKJ6So>, own translation from Arabic.

³⁹⁸ Ibid.

³⁹⁹ Ibid.

⁴⁰⁰ Luban reviewed a number of political considerations that the Palestinian Authority might be taking into account before seeking justice at the ICC. He quoted the Palestinian foreign minister, Riyad Al-Malki saying on the day Palestine was accepted as a non-member state at the UN: “As long as the Israelis are not committing atrocities, are not building settlements, are not violating international law, then we don’t see any reason to go anywhere. If the Israelis continue with such policy—aggression, settlements, assassinations, attacks, confiscations, building walls—violating international law, then we have no other

campaigning to pressure the Palestinian Authority to join the ICC.⁴⁰¹ More importantly, as mentioned earlier, it can be understood from ICC Prosecutor's declaration that the ICC has had jurisdiction over the OPT since December 2012, based on the Palestinian declaration in 2009 and its recognition as a non-member observer state by the General Assembly. The prosecutor made it clear that he refrained from answering the question of statehood, but that once this question is answered by other forums that he saw as competent, there is a chance to "consider allegations of crimes committed in Palestine."⁴⁰² This statement was later made milder by the newly appointed prosecutor, Fatou Bensouda, during an interview in which she stated that if the UN General Assembly accepts Palestine as a non-member state at the UN, then "we will revisit what the ICC can do."⁴⁰³

Should it be determined that the ICC has jurisdiction over Palestine, whether by virtue of the Palestinian Authority joining the Rome Statute or by power of the *ad hoc* declaration it issued in 2009, there would be potential to refer Israel's policy of forced displacement to the ICC with certain limitations related to the ICC's jurisdiction. These limitations are concerned with geography and time. First, the ICC jurisdiction will be limited to crimes committed in the territory of the Palestinian state. Article 12 (2) of the Rome Statute determines that the Court's jurisdiction extends to "[t]he State on the territory of which the conduct in question occurred;" and "[t]he State of which the person accused of the crime is a national."⁴⁰⁴ Secondly, the ICC's jurisdiction will be limited to crimes committed since the year 2002. Article 11 of the Rome Statute states:

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

remedy but really to knock those to other places." See, David Luban, "Submitting to the Law of Nations," *Boston Review*, December 12, 2012,

http://www.bostonreview.net/BR37.6/david_luban_palestine_israel_international_criminal_court.php.

⁴⁰¹ Palestinian Centre for Human Rights, "PCHR Launches Campaign 'Palestine to the ICC,'" *PCHR*, December 10, 2012,

http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=9110:pchr-launches-campaign-palestine-to-the-icc&catid=145:in-focus; Human Rights Watch, "Israel/Palestine: New Abuses, No Justice," February 14, 2013, <http://www.hrw.org/news/2013/02/14/israelpalestine-new-abuses-no-justice>.

⁴⁰² ICC- The Office of the Prosecutor, "Situation in Palestine."

⁴⁰³ Fatou Bensouda, The International Criminal Court: A New Approach to International Relations, Council on Foreign Relations, September 21, 2012, <http://www.cfr.org/international-criminal-courts-and-tribunals/international-criminal-court-new-approach-international-relations/p29351>.

⁴⁰⁴ UN General Assembly, "Rome Statute of the International Criminal Court," Article 12(2).

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.⁴⁰⁵

This provision in the Rome Statute means that there are two options for a state joining the ICC in relation to the jurisdiction it gives the ICC. For states that provide jurisdiction to the ICC by becoming a member to the Rome Statute or by making a declaration, the jurisdiction can either start from the date in which that state became a party to the Rome Statute takes effect, or an earlier date if the state's declaration provided such a date.⁴⁰⁶ In the case of Palestine, the declaration deposited at the ICC's registrar office in 2009 provided recognition of the jurisdiction of the ICC since 1 July 2002, the date in which the Rome Statute entered into force.⁴⁰⁷

Hence, waves of forced displacement that took place prior to July 2002 will not be part of the jurisdiction of the court. Similarly, all displacements that take place within the sovereign territory of Israel are also excluded from such jurisdiction. Nonetheless, the existence of a potential to prosecute authors of the policies and orders of forced displacement in Israel continues to be a unique opportunity that might provide some future protection to at least part of the Palestinian civilian population.

But at the same time, regardless of what happens with the ICC, the transitional justice approach to peace and reconciliation and, more generally, the elements of justice require a comprehensive treatment of the question of accountability in relation to forced displacement, as well as other crimes committed by both parties to the conflict. As seen in the cases of Former Yugoslavia, Colombia and Estonia, the condemnation of human rights violations by treating them as crimes is needed. As long as forced displacement is considered to be part of the law as opposed to a crime, it cannot be expected that the violations will stop, especially in light of an ideological motive behind it. The criminalization of widespread human rights violations will not only end impunity, but will

⁴⁰⁵ Ibid., Article 11.

⁴⁰⁶ "Q&A: Palestinians' Upgraded UN Status," *BBC*, November 30, 2012, sec. Middle East, <http://www.bbc.co.uk/news/world-middle-east-13701636>.

⁴⁰⁷ Ali Khashan, Palestinian Minister of Justice, "Declaration Recognizing the Jurisdiction of the International Criminal Court."

also set the rules for the development of the local communities in Israel/Palestine to refrain from persecution as a method to advance national endeavours.

5.3.2.3 Reparations: Legal and Institutional Reforms, Return, Restitution and Compensation

During the war that inflicted the exodus of 1948, the UN dispatched Count Falk Bernadotte to serve as a mediator in Palestine and instructed him to report to the Security Council and the Secretary General.⁴⁰⁸ In his final report, Bernadotte stressed on the importance of providing reparations to the victims of displacement as part of the final settlement of the conflict in Palestine.⁴⁰⁹ He argued:

no settlement can be just and complete if recognition is not accorded to the right of the Arab refugee to return to the home from which he has been dislodged by the hazards and strategy of the armed conflict between Arabs and Jews in Palestine. The majority of these refugees have come from territory which, under the Assembly resolution 29 November, was to be included in the Jewish state. It would be an offence against the principles of elemental justice if these innocent victims of the conflict were denied the right to return to their homes while Jewish immigrants flow into Palestine, and, indeed, at least offer the threat of permanent replacement of the Arab refugees who have been rooted in the land for centuries.⁴¹⁰

Based on the notion that the prevention of the right of the refugees to return would be an offence to justice, Bernadotte recommended:

The right of the Arab refugees to return to their homes in Jewish-controlled territory at the earliest possible date should be affirmed by the United Nations, and their repatriation, resettlement and economic and social rehabilitation, and payment of adequate compensation for the property of those choosing not to return, should be supervised and assisted by the United Nations conciliation commission.⁴¹¹

Following this recommendation, the UN General Assembly issued the infamous resolution 194, which stated, *inter alia*, that the General Assembly:

⁴⁰⁸ UN General Assembly, "Resolution 186(S-2)- Appointment and Terms of Reference of a United Nations Mediator in Palestine," May 14, 1948, para. 2.

⁴⁰⁹ United Nations Mediator on Palestine, *Progress Report of the United Nations Mediator on Palestine Submitted to the Secretary-General for Transmission to the Members of the United Nations* (Paris, September 16, 1948), UN. Doc. A/689, <http://unispal.un.org/UNISPAL.NSF/0/AB14D4AAFC4E1BB985256204004F55FA>.

⁴¹⁰ Ibid.

⁴¹¹ Ibid.

Resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible...⁴¹²

Similarly, in the aftermath of the 1967 exodus, the UN Security Council adopted a resolution:

calling upon the Government of Israel to ensure the safety, welfare and security of the inhabitants of the areas where military operations have taken place and to facilitate the return of those inhabitants who have fled the areas since the outbreak of the hostilities.⁴¹³

These two resolutions reaffirmed the right of those who had been displaced during the war to return. Similarly, the UN General Assembly adopted a number of resolutions to support the right of those displaced from the occupied territory to return to their homes. First, in 1967 it welcomed “with great satisfaction” the Security Council resolution 237 mentioned above.⁴¹⁴ Then, between 1967 and the current day it has issued resolutions in every session reaffirming the right of return of those displaced in the 1967 war. The General Assembly first called upon “the government of Israel to take effective and immediate steps for the return without delay of those inhabitants who have fled the areas since the outbreak of the hostilities.”⁴¹⁵ In 1969, its resolution 2535 included the right of the “displaced persons and the refugees” as part of the “inalienable rights of the people of Palestine.”⁴¹⁶ In 1975, the General Assembly condemned “the evacuation, deportation, expulsion, displacement and transfer of the Arab inhabitants of the occupied territories and the denial of their right to return.”⁴¹⁷ This affirmation of the right of the displaced persons to return continued also after the peace process started, with a pattern of calling for an “accelerated return through the mechanism agreed upon by the parties.”⁴¹⁸

⁴¹² UN General Assembly, “Resolution 194 (III),” 1948.

⁴¹³ UN Security Council, “Resolution 237,” June 14, 1967.

⁴¹⁴ UN General Assembly, “Resolution 2252 (ES-V),” 4 July 1967.

⁴¹⁵ UN General Assembly, “Resolution 2452,” 1968; UN General Assembly, “Resolution 2535,” 1969.

⁴¹⁶ UN General Assembly, “Resolution 2535,” 1969.

⁴¹⁷ UN General Assembly, “Resolution 3525,” 1975.

⁴¹⁸ UN General Assembly, “Resolution 50/28C,” 1995.

The consistency of the UN in demanding the right of the refugees of the two wars to return to their homes, and the reference to compensation in resolution 194 reflect an understanding to long standing customary international legal principles related to redressing the victims of displacement. The right to return, property restitution and compensation are, as will be shown below, the legally required reparations to displacement in addition to truth and accountability.

In addition, these remedies have been consistently used by countries referring to the transitional justice framework.⁴¹⁹ As Duthie argues,

Transitional justice measures have been developed primarily as means to address serious human rights violations as part of a rights based approach to promoting accountability for perpetrators, acknowledgment of wrongdoing and redress for victims.⁴²⁰

As argued by Duthie, redressing the victims is part of a holistic approach to addressing past human rights violations, and without it the transitional justice process would not be meaningful. In the previous section, it was shown that the question of prosecuting the perpetrators of gross human rights violations has been a subject of disagreement between transitional justice contributors; a gap that was translated into a variety of policy options for transitional societies.⁴²¹ Nonetheless, as this section will show, there is no major disagreement among contributors that the implementation of international legal principles in providing remedies to the victims is part of the transitional justice framework.

Since the mass displacement that Israel inflicted during the *Nakba* in order to change the demographic character of the areas on which it was established during the war, the right of the Palestinian refugees to return to their homes became one of the main demands of the Palestinian people to the extent that it was called a “sacred” right.⁴²² The Palestinian right to return is backed by international legal principles that the UN

⁴¹⁹ Roger Duthie, “Incorporating Transitional Justice into the Response to Displacement,” in *Transitional Justice and Displacement*, ed. Roger Duthie, Advancing Transitional Justice 5 (Social Science Research Council, 2012), 14–5; Duthie, “Transitional Justice and Displacement,” July 1, 2011, 245–7.

⁴²⁰ Duthie, “Incorporating Transitional Justice into the Response to Displacement,” 25.

⁴²¹ See, sec. 5.3.2.2 above.

⁴²² Salman Abu Sitta, “The Right of Return: Legal, Possible, and Sacred,” in *Palestinian Refugees: The Right of Return*, ed. Naseer Aruri (Pluto Press, 2001).

recognized through the General Assembly and Security Council resolutions quoted above and many others.⁴²³ Against this background, coupled with Israel's consistent rejection to repatriate the Palestinian refugees,⁴²⁴ a number of scholars and other contributors have devoted considerable efforts advocating for a "rights based approach" to resolving the refugee issue focusing on demanding the exercise of all those displaced of their right to return home.⁴²⁵ This approach presents its case based on several legal arguments that conclude that there are a number of customary international legal principles that grant every displaced person, including Palestinians, the right to return to his home. Although these arguments have been examined in Chapter 4 and part of the present chapter, it is necessary for the sake of the current discussion to summarize them. First, international

⁴²³ The two main resolutions related to the return of the refugees are, first, UN General Assembly, "Resolution 194(III)," 1948; and second, UN Security Council, "Resolution 237," 14 June 1967; In addition to these two resolutions, the General assembly has been issuing resolutions on an annual basis to reaffirm the right of refugees and displaced persons to return to their homes. See the following examples, UN General Assembly, "Resolution 2452," 1968; UN General Assembly, "Resolution 2535," 1969; UN General Assembly, "Resolution 2672D," 1970; UN General Assembly, "Resolution 2792," 1971; UN General Assembly, "Resolution 2963," 1972; UN General Assembly, "Resolution 3089," 1973; UN General Assembly, "Resolution 3240," 1974; UN General Assembly, "Resolution 3525," 1975; UN General Assembly, "Resolution 31/15," 1976; UN General Assembly, "Resolution 32/90," 1977; UN General Assembly, "Resolution 40/165," 1985; UN General Assembly, "Resolution 41/69," 1986; UN General Assembly, "Resolution 42/69," 1987; UN General Assembly, "Resolution 43/57," 1988; UN General Assembly, "Resolution 44/48," 1989; UN General Assembly, "Resolution 56/99," 2010; UN General Assembly, "Resolution 50/28C," 1995; UN General Assembly, "Resolution 33/112," 1979; UN General Assembly, "Resolution 34/52," 1980; UN General Assembly, "Resolution 35/169," 1981; UN General Assembly, "Resolution 36/120," 1982; UN General Assembly, "Resolution 37/88," 1983; UN General Assembly, "Resolution 38/79," 1984; UN General Assembly, "Resolution 39/99," 1985.

⁴²⁴ This has been discussed in Chapter 2 and section 5.1 above

⁴²⁵ See, for example, Susan M. Akram, "Myths and Realities of the Palestinian Refugee Problem: Reframing the Right of Return," *The MIT Electronic Journal of Middle East Studies* (2008): 183; Susan M. Akram and Terry Rempel, "Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees," *Boston University International Law Journal* 22 (2004): 1; Naseer Aruri, ed., *Palestinian Refugees: The Right of Return*, vol. 1st (London: Pluto Press, 2001); Gail Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis* (Bethlehem, Palestine: Badil, 2001); W. Thomas Mallison and Sally V. Mallison, "The Right of Return," *Journal of Palestine Studies* 9, no. 3 (April 1, 1980): 125–136; Mutaz Qafisheh, "Bases for the Palestinian Refugees' Right of Return Under International Law: Beyond General Assembly Resolution 194," accessed November 26, 2012, <http://www.cjicl.org.uk/index.php/cjicl-blog/entry/bases-for-the-palestinian-refugees-right-of-return>; J. Quigley, "The Right of Return of Displaced Jerusalemites," *Jerusalem Quarterly* 25 (1998): 19; John Quigley, "Mass Displacement and the Individual Right of Return," *British Yearbook of International Law* 68, no. 1 (January 1, 1998): 65–125; John Quigley, "Family Reunion and the Right to Return to Occupied Territory," *Georgetown Immigration Law Journal* 6 (1992): 223–251; John Quigley, "Displaced Palestinians and a Right of Return," *Harvard International Law Journal* 39, no. 1 (1998): 171–229; Glen Rangwala, *Negotiating the Non-negotiable: The Right of Return and the Evolving Role of Legal Standards* (Bethlehem: Badil, 2003).

human rights law recognized prior to 1948 the right of every person to return to his country, obviously without excluding displaced persons from such right.⁴²⁶ Secondly, forced displacement of civilians is considered a war crime if committed during an armed conflict or an occupied territory, and a crime against humanity if perpetrated against any civilian population in a widespread or systematic manner.⁴²⁷ Thirdly, the denationalization of citizens is illegal; and if during state succession a state does not pass its nationality to its habitual residents this act amounts to denationalization according to the international laws of nationality and state succession.⁴²⁸ Furthermore, Israel's use of status revocation in the OPT is illegal because an occupying power is obliged to refrain from changing the laws in an occupied territory in a way that affects their rights, even in the case of annexation.⁴²⁹

Based on the illegality of Israel's conduct the law of state responsibility, as argued earlier in the present chapter, obliges it to provide meaningful remedies to the displaced persons. Such remedy must, as ruled by the PCIJ as early as 1928, "wipe out all the

⁴²⁶ Quigley, "Displaced Palestinians and a Right of Return," 169; Alfred de Zayas, "Illegality of Population Transfers and the Application of Emerging International Norms in the Palestinian Context, The," *Palestine Yearbook of International Law* 6 (1991 1990): 17; Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*, 36; Guy Goodwin-Gill, "The Right to Leave, the Right to Return and the Question of a Right to Remain," in *The Problem of Refugees in the Light of Contemporary International Law Issues: Papers Presented at the Colloquium Organized by the Graduate Institute of International Studies in Collaboration with the Office of the United Nations High Commissioner for Refugees, Geneva, 26 and 27 May, 1994*, ed. Vera Gowlland Debbas (Martinus Nijhoff Publishers, 1996); Hurst Hannum, *The Right to Leave & Return in International Law and Practice* (Martinus Nijhoff Publishers, 1987), 60; Kathleen Lawand, "The Right to Return of Palestinians in International Law," *International Journal of Refugee Law* 8, no. 4 (October 1, 1996): 544; Eric Rosand, "The Kosovo Crisis: Implications of the Right to Return," *Berkeley Journal of International Law* 18, no. 2 (2000): 232; Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (The Hague: Martinus Nijhoff Publishers, 1995), 79.

⁴²⁷ Guido Acquaviva, *Forced Displacement and International Crimes*, Legal and Protection Policy Research Series (Geneva: UNHCR, June 2011), <http://www.unhcr.org/4e0344b344.pdf>; Quigley, "Displaced Palestinians and a Right of Return," 219–224; Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*, 28–35; Andreu-Guzman, "Criminal Justice and Forced Displacement: International and National Perspectives," 233–247; Alfred M. de Zayas, "International Law and Mass Population Transfers," *Harvard International Law Journal* 16 (1975): 209–227; Bassiouni, *Crimes Against Humanity*, 381–396.

⁴²⁸ Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*, 13–27; Victor Kattan, "The Nationality of Denationalized Palestinians," *Nordic Journal of International Law* 74 (2005): 67–102; Quigley, "Displaced Palestinians and a Right of Return," 205–211.

⁴²⁹ This was discussed in Chapter 4. To the best of the current author's knowledge, this type of analysis has not been presented in the same depth in literature discussing residency status in the OPT. See sec. 4.3.2.2 above.

consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”⁴³⁰ The law of state responsibility has consistently required a state to redress the victims by providing restitution, compensation and satisfaction.⁴³¹ When it comes to forcibly displaced persons, whether within the borders of a state or across these borders, “restitution” has a twofold meaning: first, allowing those who were displaced to return to their homes and second allowing them to repossess their property (known widely as restitution of property). If those displaced were also stripped from their citizenship or right to reside in their cities or villages, the meaningful reparation means necessarily to repatriate them by giving them back their citizenship or other status that allows them to live in their homes. A reparation process cannot be considered meaningful unless it provided this right.

Other relevant instruments of international law have recognized the right to return, property restitution and compensation. For example, the 1950 statute of the United Nations High Commissioner for Refugees (hereinafter UNHCR), a UN agency concerned with the protection of refugees, determines that the agency has the mandate to assist “Governments and... private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.”⁴³² The UNHCR deals with the right to return to one’s home of origin and the right to a nationality as legal entitlements derived from one’s basic human rights.⁴³³

In 2002, the UN Sub-Commission on the Promotion and Protection of Human Rights appointed Sergio Pinheiro as a Special Rapporteur on Housing and Property Restitution for Refugees and Internally Displaced Persons.⁴³⁴ Subsequently in 2003, the Sub-Commission asked him to draft principles related to the rights of refugees and IDPs returning to their homes, aimed at giving “practical guidance to states, UN agencies and

⁴³⁰ Case Concerning the Factory at Chorzow (Ser A.), No. 17, 47 (Permanent Court of International Justice 1928), 47.

⁴³¹ International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts,” Articles 35–7.

⁴³² UN General Assembly, “Statute of the Office of the United Nations High Commissioner for Refugees,” December 14, 1950, Article 1, UN. Doc. A/RES/428(V).

⁴³³ UNHCR, *Handbook: Voluntary Repatriation: International Protection* (Geneva, 1996), sec. 2.1.

⁴³⁴ Centre on Housing Rights and Evictions, *The Pinheiro Principles: United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons* (Geneva, 2005), 4.

broader international community on how best to address complex legal and technical issues surrounding housing, land and property restitution.”⁴³⁵ The final report presenting the principles, that came to be known as the “Pinheiro Principles,” was submitted and subsequently adopted by the UN Sub-Commission in 2005.⁴³⁶ The principles recognized everyone’s right “to be protected against being arbitrarily displaced from his or her own home, land or place of habitual residence.”⁴³⁷ Furthermore, the principles stated that “[a]ll refugees and displaced persons have the right to return voluntarily to their former homes, lands or places of habitual residence, in safety and dignity.”⁴³⁸

In 1998, the “Representative of the Secretary General on internally displaced persons,” Francis Deng, submitted a report to the Commission on Human Rights including “Guiding Principles on Internal Displacement.”⁴³⁹ Principle 6 stated that “[e]very human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.”⁴⁴⁰ Principle 28 states:

Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country.⁴⁴¹

Building on these principles, the Representative of the Secretary General submitted a report in 2010 outlining a “Framework on Durable Solutions for Internally Displaced Persons.”⁴⁴² According to this framework, the durable solutions that the internally displaced could choose from were listed as: return to the place of origin, local integration in the place of refuge or integration in another part of the country.⁴⁴³ The

⁴³⁵ Ibid.

⁴³⁶ UN Sub-Commission on the Promotion and Protection of Human Rights, “Final Report of the Special Rapporteur, Paulo Sérgio Pinheiro, Principles on Housing and Property Restitution for Refugees and Displaced Persons” (E/CN.4/Sub.2/2005/17, June 28, 2005).

⁴³⁷ Ibid., Principle 5.1.

⁴³⁸ Ibid., Principle 10.1.

⁴³⁹ UN Commission on Human Rights, “Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission Resolution 1997/39. Addendum: Guiding Principles on Internal Displacement.”

⁴⁴⁰ Ibid., Principle 6.

⁴⁴¹ Ibid., Principle 28 (1).

⁴⁴² UN Human Rights Council, “Framework on Durable Solutions for Internally Displaced Persons.”

⁴⁴³ Ibid., para. 9.

selection of the durable solution is based upon the voluntary choice of the displaced person himself.⁴⁴⁴ Furthermore, any choice the displaced person takes does not forfeit his right to return to his home of origin later, as he can exercise this right once return “becomes feasible,” despite having benefited from another durable solution earlier.⁴⁴⁵

Hence, the right to return of all refugees and internally displaced persons to their homes of origin has been consistently recognized by international legal instruments as an entitlement that the refugee should enjoy as a remedy of his/her own choice. These principles apply to all Palestinian refugees and internally displaced persons regardless of where they were displaced from and during which wave of displacement. In fact, the General Assembly resolution 194⁴⁴⁶ of 1948 and the Security Council resolution 237 of 1967⁴⁴⁷ reflected international legal principles that had existed prior to each of the two exoduses. As Salman Abu Sitta insists, “[General Assembly] Resolution 194 is not an invitation. It is the embodiment and restatement of international law.”⁴⁴⁸ Hence, return would be exercised, as John Quigley put it, “as a matter of right, not as a matter of Israeli grace.”⁴⁴⁹

This right is due to be exercised regardless of the reasons that led to the displacement. Whether a particular refugee was forcibly displaced or whether he/she left voluntarily but was not readmitted later, he would have the right to return in both cases.⁴⁵⁰

As to the question of the geographical jurisdiction of where the return shall be it is that which includes their homes of origin. As such, the 1948 refugees’ return shall be to Israel. As Gail Boling argues,

⁴⁴⁴ Ibid., para. 21 (d).

⁴⁴⁵ Ibid.

⁴⁴⁶ UN General Assembly, “Resolution 194,” 1948.

⁴⁴⁷ UN Security Council, “Resolution 237,” 14 June 1967.

⁴⁴⁸ Abu Sitta, “The Right of Return: Legal, Possible, and Sacred,” 197.

⁴⁴⁹ Quigley, “Displaced Palestinians and a Right of Return,” 227.

⁴⁵⁰ Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*, 7; John Quigley, “Repatriation of Displaced Palestinians as a Legal Right,” *Nexus* 8 (2003): 27; Quigley, “Displaced Palestinians and a Right of Return,” 172.

Israel's obligation to repatriate the 1948 Palestinian refugees is ... absolute and unqualified. Since no other state constitutes a state of origin for this particular group of refugees, no other state has any duty whatsoever to repatriate them.⁴⁵¹

Similarly, those who were displaced from the West Bank (including East Jerusalem) or Gaza Strip have the right to be repatriated in their homes of origin. The exact place where the refugees are to return is their homes, as explicitly pronounced by General Assembly resolution 194 and shown in the legal analysis above. In addition, those who will return will have to receive a similar legal status to the population of the place where they will be repatriated. As such, those who return to Israel should be granted Israeli citizenship and be treated without discrimination.⁴⁵² A similar rule applies to those who return to the West Bank and Gaza.

In addition to this, this right of return is optional to every displaced person and it also entails a right not to return.⁴⁵³ This is a reflection of the principle of *non-refoulement* that appears in the Refugee Convention⁴⁵⁴ and which had existed prior to the mass displacement of the Palestine refugees and was reflected in General Assembly resolution 194.⁴⁵⁵

The right to return has an individual and a collective character. On the one hand, each displaced person can individually chose whether to return or not, but on the other hand, the mass expulsion has prevented the right of the Palestinian people to exercise its

⁴⁵¹ Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*, 8.

⁴⁵² "Palestinian Paper on Refugees" (Le Monde diplomatique - English edition), accessed December 13, 2012, <http://mondediplo.com/focus/mideast/palestinianrefugees200101>, Articles 25-6.

⁴⁵³ General Assembly resolution 194 demands to allow the return of those who wish to return. UN General Assembly, "Resolution 194," 1948; Bell, *Peace Agreements and Human Rights*, 237.

⁴⁵⁴ "Convention Relating to the Status of Refugees," 1951, Article 33.

⁴⁵⁵ An analysis published by the United Nations to explain the meaning of Paragraph 11 in GA Res 194(III) stated that the meaning of "wishing to return" includes "the right of the refugees to choose not to return." See, UNITED NATIONS CONCILIATION COMMISSION FOR PALESTINE, "Analysis of Paragraph 11 of the General Assembly's Resolution of 11 December 1948 (Working Paper Compiled by the Secretariat)" (A/AC.25/W/45, May 15, 1950), <http://unispal.un.org/UNISPAL.NSF/0/94F1C22721945319852573CB00541447>; Terry Rempel and Susan M. Akram, "Temporary Protection For Palestinian Refugees: A Proposal," in *Rights in Principle, Rights in Practice: Revisiting the Role of International Law in Crafting Durable Solutions for Palestinian Refugees*, ed. Terry Rempel (Beithlehem: Badil, 2009), 289–90.

collective right to self-determination. These two categories of rights are not mutually exclusive, but rather complement each other.⁴⁵⁶

The second reparation that refugees and IDPs are entitled to is property restitution. This remedy is consistent with the law of state responsibility, which gives a priority to reversing the injury caused by the wrongful act, or as the Draft Articles of State Responsibility provide, by re-establishing “the situation which existed before the wrongful act was committed.”⁴⁵⁷ In 1948, Restitution was also declared as a remedy in General Assembly Resolution 194 which declared that the refugees return shall be to “their homes.”⁴⁵⁸

Although property restitution has an intimate nexus to the right of return, especially when it is thought of in the context of the displaced Palestinians, it is separate from it. Restitution of property to its owner is certainly due whether such owner made the choice of return or decided to stay in exile.⁴⁵⁹ Their entitlement to their movable and immovable property is not less than that of a returning refugee. A displaced persons’ exercise of his/her free choice of no return should not be used to deprive him/her from other rights. The consistence of this principle with international law, especially in the

⁴⁵⁶ Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*, 9.

⁴⁵⁷ International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts”, Article 35.

⁴⁵⁸ This conclusion was reached by the UNCCP Secretary’s report presenting an analysis of the meaning of the article. In this context, he wrote: “There is no doubt that in using this term the General Assembly meant the home of each refugee, i.e. his house or lodging and not his homeland.” UNITED NATIONS CONCILIATION COMMISSION FOR PALESTINE, “Analysis of Paragraph 11”; Terry Rempel and Paul Prettitore, “Restitution and Compensation for Palestinian Refugees and Displaced Persons: Principles, Practical Considerations, and Compliance,” in *International Law and the Israeli-Palestinian Conflict: A Rights-Based Approach to Middle East Peace*, ed. Susan M. Akram et al. (Taylor & Francis, 2011), 71; Leila Hilal, *Transitional Justice Responses to Palestinian Dispossession: Focus on Restitution*, Case Studies on Transitional Justice and Displacement (ICTJ and Brookings-LSE Project on Internal Displacement, August 2012), 12–3, <http://ictj.org/publication/transitional-justice-responses-palestinian-dispossession-focus-restitution>.

⁴⁵⁹ Rempel and Prettitore, “Restitution and Compensation for Palestinian Refugees and Displaced Persons: Principles, Practical Considerations, and Compliance,” 72.

context of displaced persons, was confirmed by the Pinheiro principles.⁴⁶⁰ These principles provided:

Refugees and displaced persons shall not be forced or otherwise coerced, either directly or indirectly, to return to their former homes, lands or places of habitual residence. Refugees and displaced persons should be able to effectively pursue durable solutions to displacement other than return, if they so wish, without prejudicing their right to the restitution of their housing, land and property.⁴⁶¹

Indeed, restitution is an answer to displacement in general, but more specifically, it is a remedy for arbitrary dispossession of property. Therefore, this remedy should be implemented regardless of the status of the person who was arbitrarily dispossessed, whether refugee, internally displaced or whether displaced as refugee but that status ended. The Pinheiro Principles stated that the restitution claim process should be accessible

for refugees and other displaced persons regardless of their place of residence during the period of displacement, including in countries of origin, countries of asylum, or countries to which they have fled.⁴⁶²

The hard question in restitution arises concerning the destiny of secondary occupants who might be residing in the property of a dispossessed displaced person. In such a case, whose interest is to be prioritized: the interest of the claiming dispossessed or the interest of the occupant? International law does not give a clear answer to this question. However, the Pinheiro Principles provided some general basic guidance rules. First, they provided that the human rights of secondary occupants must be protected, including that they are not arbitrarily evicted from the property and that any eviction shall be done with due process.⁴⁶³ With regards to this, the Pinheiro principles also stated:

States should ensure that the safeguards of due process extended to secondary occupants do not prejudice the rights of the legitimate owners, tenants and other

⁴⁶⁰ UN Sub-Commission on the Promotion and Protection of Human Rights, "Final Report of the Special Rapporteur, Paulo Sérgio Pinheiro, Principles on Housing and Property Restitution for Refugees and Displaced Persons."

⁴⁶¹ Ibid., Principle 10.3.

⁴⁶² Ibid. Principle 13.4.

⁴⁶³ Ibid., Principle 17.1.

rights holders to repossess the housing, land and property in question in a just and timely manner.⁴⁶⁴

Hence, according to the Pinheiro principles, a state is expected to develop a policy that balances the rights of the “legitimate owners” and the “secondary occupants,” and guarantee due process in making claims. Indeed, the conflict of interest between legitimate owners and secondary occupants has been tackled by varying policies around the world while seeking a transitional justice framework to solving the consequences of the displacement problem.

In addition to return and property restitution, compensation is another way to redress the victims. Compensation as a remedy to wrongful acts is invoked when restitution has not fully reversed the harm caused by the failure to meet a state’s obligation, as the law of state responsibility stipulates.⁴⁶⁵ Remedies have to be provided to repair the wrongful act, in the prioritized form of restitution or in the form of compensation, or a combination of both.⁴⁶⁶

The compensation to the 1948 refugees was explicitly mentioned in General Assembly Resolution 194⁴⁶⁷ reflecting a widely accepted principle of compensation when restitution is impossible.⁴⁶⁸ This resolution spoke about two kinds of compensation, one to “the property of those choosing not to return” and the second for “loss of or damage to property” any damages to the property of those displaced.⁴⁶⁹ A similar conclusion can be made toward the property of those who were displaced in the 1967 war or through any other method of displacement.⁴⁷⁰

⁴⁶⁴ Ibid., Principle 17.2.

⁴⁶⁵ Case Concerning the Factory at Chorzow (Ser A.), No. 17, 47 (Permanent Court of International Justice 1928), 47; International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts,” 36.

⁴⁶⁶ Michael Lynk, “The Right to Restitution and Compensation in International Law and the Displaced Palestinians,” *Canada’s Periodical on Refugees* 21, no. 2 (2003): 100.

⁴⁶⁷ UN General Assembly, “Resolution 194,” 1948.

⁴⁶⁸ Rempel and Prettitore, “Restitution and Compensation for Palestinian Refugees and Displaced Persons: Principles, Practical Considerations, and Compliance,” 72.

⁴⁶⁹ UN General Assembly, “Resolution 194,” 1948, para. 11.

⁴⁷⁰ Lynk, “The Right to Restitution and Compensation in International Law and the Displaced Palestinians,” 103.

Finally, there is an additional remedy that is required by Israel which has not been specifically articulated by contributors working on the Palestinian-Israeli displacement problem: legal and institutional reform. As argued earlier, Israel has not only cemented its war displacement through discriminatory laws, but it has also been inflicting continuous displacement by the power of its legal regimes.⁴⁷¹ Obviously, there is a legal requirement to reform any discriminatory legal system, but this reform turns into part of the remedy process in transitional situations. The Pinheiro Principles stipulate that states “should take immediate steps to repeal unjust or arbitrary laws and laws that otherwise have a discriminatory effect on the enjoyment of the right to housing, land and property restitution and should ensure remedies for those wrongfully harmed by prior application of such laws.”⁴⁷² Similarly, the UN Framework on Durable Solutions for Internally Displaced Persons requires that national laws “need to be examined and, when necessary, revised to ensure that IDPs do not lose property rights on the basis of an unfair application of legal provisions on abandoned property or adverse possession.”⁴⁷³ Clearly, without repealing discriminatory laws the whole process of providing remedies to the victims is rendered meaningless. This is evident from the path taken in the transitional Israeli-Palestinian peace agreements which had no reference to Israeli discriminatory laws. As shown in Chapter 3 and earlier in the present chapter, forced displacement increased in the transitional period. The benefits that are sought by such legal reform are twofold: first, as required by the law of state responsibility,⁴⁷⁴ a legal and institutional reform guarantees stopping the violation of international legal commitments. Secondly, such reform is essential to give force to the other reparations.⁴⁷⁵

⁴⁷¹ This has been discussed thoroughly in Chapters 2 and 3.

⁴⁷² UN Sub-Commission on the Promotion and Protection of Human Rights, “Final Report of the Special Rapporteur, Paulo Sérgio Pinheiro, Principles on Housing and Property Restitution for Refugees and Displaced Persons,” Principle 19.2.

⁴⁷³ UN Human Rights Council, “Framework on Durable Solutions for Internally Displaced Persons,” para. 80.

⁴⁷⁴ International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts,” Article 30, stipulating that a state must first cease the wrongful act and “offer appropriate assurances and guarantees of non-repetition.”

⁴⁷⁵ See discussion in this section below on how societies in transition changed their legislations as part of their endeavor to redress the victims of displacement and end the policies that inflicted such displacements.

In light of the fears from the threat of the peace process framework on the rights of the displaced persons, especially those who were displaced from current day Israel, the individual aspect of the right of return was stressed by contributors who referred to a “rights-based approach” to resolving the displacement issue.⁴⁷⁶ The most important implication of this approach is that the decision of return is subject to the sole discretion of the refugee. As such, the advocates of the rights-based approach have been vocal about the invalidity of a provision in any peace agreement that “gives up” the right to return. For example, Glen Rangwala argued that

The right of return has been conceived as a human right, within the sphere of the international law of human rights. In this sense, it is absolute and inalienable, and – crucially in this contrast—it is non-negotiable at the political level. The right rests with the individual, and only the individual can choose not to exercise it at any point in time. From this standpoint, a governing authority or international representative can no more negotiate away an individual’s right of return than they can dispense with that individual’s right not to be tortured.⁴⁷⁷

Thus, Rangwala’s argument is essentially that the right of return is non-negotiable because it is an individual human right that each of the refugees should be entitled to enjoy. Her conclusion was also shared by John Quigley who argued:

The displaced Palestinians should not have to lobby for their right of return, either vis-à-vis Israel or vis-à-vis the Palestinian leadership. The right is guaranteed by human right norms. Just as a state that tortures is obliged to desist without being cajoled and without negotiation, so a state that refuses to repatriate is obliged to desist, namely, by repatriating.⁴⁷⁸

The rights-based school’s conclusion on the right of return is consistent with international law. Since, as argued earlier, the right of return is derived from the basic

⁴⁷⁶ Boling, *The 1948 Palestinian Refugees and the Individual Right of Return: An International Law Analysis*; Quigley, “Mass Displacement and the Individual Right of Return”; Quigley, “Family Reunion and the Right to Return to Occupied Territory”; Rangwala, *Negotiating the Non-negotiable: The Right of Return and the Evolving Role of Legal Standards*; Qafisheh, “Bases for the Palestinian Refugees’ Right of Return Under International Law”; Abu Sitta, “The Right of Return: Legal, Possible, and Sacred”; Ghada Karmi, “Only Palestinian Refugees Can Give up Their Right of Return,” *The Guardian*, January 24, 2011, <http://www.guardian.co.uk/world/2011/jan/24/palestinian-refugees-right-return>.

⁴⁷⁷ Rangwala, *Negotiating the Non-negotiable: The Right of Return and the Evolving Role of Legal Standards*, 3.

⁴⁷⁸ John Quigley, “International Law and the Palestine Refugees,” *Hastings International and Comparative Law Review* 28 (2005 2004): 409.

human rights of the displaced person then a political and transitional process needs to respond by opening venues that allow the return of refugees to their homes of origin.

This leads us to the next question in the current discussion: how does the transitional justice framework interact with the rights to return, restitution and compensation as well as legal and institutional reform?

As shown in the literature review in Chapter 1, several authors have discussed the use of the transitional justice framework in solving the Palestinian refugees' problem, but either ignored or misinterpreted the meaning of the right of return. The main focus of most contributors was on truth commissions, where the issue of return was not discussed, as if it had no relation with the question of truth.⁴⁷⁹ Peled and Rouhana took a different approach in their book chapter entitled "Transitional Justice and the Right of Return of the Palestinian Refugees."⁴⁸⁰ They successfully explained the significance of the Palestinian right of return from a Palestinian perspective, and the Israeli denial of such a right in fear that exercising it might hinder the Jewish character of the state.⁴⁸¹ However, when they discussed the right of return as a solution they presented the following statement:

[T]he Principles of transitional justice would suggest, we argue, the separation of the right of return, which is non-negotiable for the Palestinians, from the means and ways of realisation of that right in practice, which could be negotiated between the two sides.⁴⁸²

The authors reached this conclusion based on a number of "moral" arguments that suggest a high moral value in recognition of the right of return but at the same time taking into account the rights that Israel acquired since its existence as a state. After correctly stressing the moral value of recognizing the right of the Palestinians to return to their homes in Israel and not to any other state the authors argued that "the actual means of realisation of the right of return could be negotiated in a way that would take the

⁴⁷⁹ Dudai, "A Model for Dealing with the Past in the Israeli-Palestinian Context"; Miller, "Settling With History: A Hybrid Commission of Inquiry for Israel/Palestine"; Cohen, "Justice in Transition? Prospects for a Palestinian-Israeli Truth Commission."

⁴⁸⁰ Yoav Peled and Nadim Rouhana, "Transitional Justice and the Right of Return of the Palestinian Refugees," in *Israel and the Palestinian Refugees*, ed. Eyal Benvenisti, Chaim Gans, and Sari Hanafi, vol. 1st (Germany: Springer, 2007), 141–157.

⁴⁸¹ *Ibid.*, 141–144.

⁴⁸² *Ibid.*, 152.

concerns and interests of Israeli Jews into account.”⁴⁸³ Hence, Peled and Rouhana argued for a separation between a right of return and the means to realize such a right. While it is not clear from their piece how they reached that conclusion, they suggested as they laid out the objectives of their chapter that a “morally and politically sound basis” for a “workable solution” could be achieved

on the basis of a conception of justice that is not merely corrective or compensatory, but rather transformative.” They added, “This conception usually referred to as ‘transitional justice,’ does not seek to achieve a balance between the violated rights and compensatory measures. It aims, rather, to establish the principles that should govern the transition from a morally deficient (“barbaric”) society or situation to a morally superior (“minimally decent”) one.”⁴⁸⁴

This statement might explain the framework they used to reach their conclusion on separating a moral recognition of the right of return from the actual realization of this right. However, the authors understanding of transitional justice clearly contradicts with the general conception of transitional justice as defined earlier in this chapter.⁴⁸⁵ All of these definitions stress that the goal of transitional justice is to restore the rights of victims of human rights violations. In the transitional justice framework, there is a debate, as explained earlier, in relation to retribution. However, in relation to reparations, the theory and practice of transitional justice suggest that realizing a victim’s rights is the goal. As Duthie argues, “‘redressing the legacies’ [of past human rights violations] means, primarily, giving force to human rights norms that were systematically violated.”⁴⁸⁶

Countries that used the transitional justice framework to resolve the issue of displacement have consistently recognized the right of refugees and internally displaced persons to return. For example, Colombia adopted a special law for the prevention of forced displacement, which anchored a number of principles to protect the rights of those displaced in the conflict.⁴⁸⁷ The right to voluntary return or resettlement was mentioned repeatedly in the document, with a very clear statement that the forcibly displaced have

⁴⁸³ Ibid., 153.

⁴⁸⁴ Ibid., 144.

⁴⁸⁵ See, sec. 5.3.1 above.

⁴⁸⁶ Duthie, “Transitional Justice and Displacement,” July 1, 2011, 243.

⁴⁸⁷ Republic of Colombia, *Law 387*, 1997.

the right to return to their places of origin.⁴⁸⁸ In addition, the law declared that the “Colombian people have the right not to be forcibly displaced”⁴⁸⁹ and that “the families of the forcibly displaced shall benefit from the basic right of family reunification.”⁴⁹⁰ Then it provided that the state bares the responsibility “to adopt measures for the prevention of forced displacement, and for assistance, protection, socioeconomic consolidation and stabilization of persons internally displaced by violence.”⁴⁹¹ The law also created a “National System for Comprehensive Assistance to Populations Displaced by Violence,” which aims at “comprehensively” helping those who were displaced to exercise their choice of either return or resettlement and to reintegrate them into their societies again; addressing the causes of displacement by aiming at ending violence, fostering development, and promoting human rights and international humanitarian law; the integration of “public and private efforts” to prevent displacement and assist its victims; and finally guaranteeing “timely and efficient management of all economic, administrative technical and human resources” in order for justice not to be delayed.⁴⁹² The law developed a system for restitution of property and other types of support in order to help those displaced to be reintegrated⁴⁹³ and stipulated that their possession of their real estate shall not be considered as disrupted as a result of their forced absence.⁴⁹⁴

Similarly, in Timor-Leste the right to return and restitution of property were recognized and the state initiated a program called “Together Building Homes” as part of its wider reparation program to facilitate either the voluntary return or resettlement of those displaced by the conflict.⁴⁹⁵ However, due to resources restrictions, the state ended

⁴⁸⁸ Ibid. Articles 2(6), 4(1), 10(6) & 17.

⁴⁸⁹ Ibid. Article 2(7).

⁴⁹⁰ Ibid. Article 2(4).

⁴⁹¹ Ibid. Article 3.

⁴⁹² Ibid. Article 4.

⁴⁹³ Ibid. Article 19.

⁴⁹⁴ Ibid. Article 27.

⁴⁹⁵ Peter Van der Auweraert, *Dealing with the 2006 Internal Displacement Crisis in Timor-Leste: Between Reparations and Humanitarian Policymaking*, Case Studies on Transitional Justice and Displacement (ICTJ and Brookings-LSE Project on Internal Displacement, July 2012), 7.

up guaranteeing the restitution of the estate and providing cash allocations to help repairing damage resulting from partial or total destruction of the property.⁴⁹⁶

In Liberia, the state made a declaration expressing its desire to “take further confidence building measures to promote the expeditions voluntary and/or organized return and reintegration of Liberian IDPs in safety and dignity,”⁴⁹⁷ and affirming that “ALL IDPs shall have rights to their original land being restored upon their return,”[emphasis by capitalization of “all” in the original] and that measures will be taken to “facilitate to the extent possible, the recovery by the IDPs of their land, all- immovable and to the extent possible, movable property...”⁴⁹⁸ In addition, the declaration offered further access to land for purposes of settlement and agriculture.⁴⁹⁹

In South Africa, the Apartheid regime had systematically dispossessed and displaced native South Africans and concentrated them in small spaces as part of its wider racial segregation policy.⁵⁰⁰ While dispossession started in the early days of the colonial presence in South Africa,⁵⁰¹ a law that the authorities legislated in 1913, known as the “Natives Land Act,”⁵⁰² had a significant effect in inflicting a wider dispossession policy upon the native South African population by designating specific limited areas for their use.⁵⁰³ As described by Feinberg, this act was “so important because it was the first major piece of legislation that would later comprise the legal structure of apartheid.”⁵⁰⁴

⁴⁹⁶ Ibid., 7–8.

⁴⁹⁷ The Government of the Republic of Liberia, “Declaration of the Rights and Protections of Liberian Internally Displaced Persons (IDPs),” September 26, 2002.

⁴⁹⁸ Ibid.

⁴⁹⁹ Ibid.

⁵⁰⁰ Warren Freedman, “The Restitution of Land Rights in South Africa as Reparation for Past Injustices,” *Windsor Yearbook of Access to Justice* 22 (2003): 157–8.

⁵⁰¹ E. Lahiff, “‘Willing Buyer, Willing Seller’: South Africa’s Failed Experiment in Market-led Agrarian Reform,” *Third World Quarterly* 28, no. 8 (2007): 1578–9.

⁵⁰² *The Natives Land Act*, No. 27, 1913.

⁵⁰³ Williams, “The Contemporary Right to Property Restitution in the Context of Transitional Justice,” 24.

⁵⁰⁴ Harvey M. Feinberg, “The 1913 Natives Land Act in South Africa: Politics, Race, and Segregation in the Early 20th Century,” *The International Journal of African Historical Studies* 26, no. 1 (January 1, 1993): 66.

The movement that resisted the apartheid regime, early on, prioritised among its liberation goals land restitution and an equitable redistribution of lands.⁵⁰⁵ As soon as the transition started, the 1993 interim constitution of South Africa gave special attention to land restitution and included it with the supreme goals of the transitional period and the state in general. As noted by Freedman, land restitution and reform was “the only constitutionally mandated program that is specifically aimed at redressing past injustices by making reparations.”⁵⁰⁶

Under the “Equality” Article, the interim constitution provided:

Every person or community dispossessed of rights in land before the commencement of this constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights[...]⁵⁰⁷

Then, the constitution gave a relatively detailed outline on the principles that should be followed in land restitutions. First, it determined that the goal of this constitutional provision was to restore lands that were taken from their owners in violation of the prohibition against racial discrimination after a fixed date that the constitution decided to be 19 June 1913 (i.e. the date of the enactment of the Natives Lands Act).⁵⁰⁸ The constitution designed the restitution to take place within a mechanism of claims, with the state being the only respondent in all such claims.⁵⁰⁹ If the dispossessed land was owned by the state, then it would be restored to the possession of its owners.⁵¹⁰ Otherwise, if the owner was a private person, then the court might order the state to buy it or expropriate it as long as compensation is paid to the secondary occupier.⁵¹¹ Should the actual restitution be not feasible, then the state may provide an alternative state land, pay compensation to the claimant or offer an “alternative relief.”⁵¹²

⁵⁰⁵ Williams, “The Contemporary Right to Property Restitution in the Context of Transitional Justice,” 25.

⁵⁰⁶ Freedman, “The Restitution of Land Rights in South Africa as Reparation for Past Injustices,” 158.

⁵⁰⁷ *Constitution of the Republic of South Africa, Act 200, 1993*, sec. 8.

⁵⁰⁸ *Ibid.*, sec. 121(2)&(3).

⁵⁰⁹ *Ibid.*, sec. 121(2).

⁵¹⁰ *Ibid.*, sec. 123(1)(a).

⁵¹¹ *Ibid.*, sec. 123(1)(b)&(2).

⁵¹² *Ibid.*, sec. 123(3).

Based on this constitutional requirement and on the overall restorative justice philosophy of the transition in South Africa, the government further developed a comprehensive land reform policy, published in a document called “White Paper on South African Land Policy,”⁵¹³ comprised of three elements: land restitution, land redistribution and land tenure reform.⁵¹⁴ Land Restitution was designed to respond to the clear constitutional demand of returning lands that were taken from their owners based on laws of racial discrimination since 1913 as explained above. Land redistribution, in contrast, had a wider and longer term scope, aiming at reforming land ownership on the national level. The white paper explained the objective of this programme as follows:

The purpose of the land redistribution programme is to provide the poor with access to land for residential and productive uses, in order to improve their income and quality of life. The programme aims to assist the poor, labour tenants, farm workers, women, as well as emergent farmers.⁵¹⁵

The method of implementing this program was through the “willing-buyer willing-seller arrangements,” which is a policy that targeted disadvantaged persons and communities, mostly those who were discriminated against during the apartheid regime and were not allowed to own land, and encouraged them to buy land from land owners. It did this by aiding them with funds and facilitating the process.⁵¹⁶ Among the priority list of those who should benefit from the land redistribution program are those who were dispossessed or displaced outside the scope of the definition provided by the constitutional restitution program, either because they (or most probably their ancestors) were dispossessed before 1913 or because they were *not* dispossessed as a result of discriminatory laws but rather through some other procedure.⁵¹⁷

The third program, the Land Tenure Program, came to address other land-related problems that resulted from the mess created by the laws and regulations of the previous regime, especially ownership relations in the previous Bantustans. In particular, it aimed

⁵¹³ South Africa Dept of Land Affairs, *White Paper on South African Land Policy* (The Dept., National Office, 1997).

⁵¹⁴ *Ibid.*, sec. 2.3.

⁵¹⁵ *Ibid.*, sec. 4.3.

⁵¹⁶ *Ibid.*

⁵¹⁷ *Ibid.*, sec. 4.14.3.

at stabilising and strengthening the tenure rights on residential and other estates for those who never managed to acquire stable rights. The reform aimed at making evictions of such persons more difficult and to add further guarantees to people's title to their non-owned houses and lands.⁵¹⁸ This program was to be implemented in several steps and contexts, aiming eventually at building a "non-racial system of land rights for all South Africans," in accordance with "the Constitution's commitment to basic human rights and equality."⁵¹⁹ To this end, the South African parliament enacted a number of acts that aimed at reforming land relationships and protecting the disadvantaged from the threat of evictions.⁵²⁰

Hence, the approach of South Africa in terms of land restitutions and reforms was comprehensive, and is certainly a serious attempt to remedy the injustices of the past but without harming the reconciliation goal. The land policies did not simply accept the status quo created by the injustices of the past, but rather initiated a number of individual and collective reparations aiming at both immediate and long term redress. In assessing the transitional justice process of land reform in light of its relationship with international law, one can say that it can be easily seen that the constitutional declaration of equality between all South Africans, the restitution policy and all the other legislations and policies in this regard are following the principles of guaranteeing non-discrimination, accepting state responsibility, and fostering development of the whole society without harming the overarching reconciliation objective. To this extent, the policy can be seen as an honest attempt to address South Africa's legacy.

In Bosnia, the right of return was an important element of the peace process. It was incorporated into the internationally supported Dayton Peace Agreement, which allocated a special annex for redressing the issue of the refugees. It stated:

All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which

⁵¹⁸ Lionel Cliffe, "Land Reform in South Africa," *Review of African Political Economy* 27, no. 84 (2000): 275.

⁵¹⁹ South Africa Dept of Land Affairs, *White Paper on South African Land Policy*, sec. 4.15.

⁵²⁰ *Communal Property Associations Act*, 28, 1996; *Interim Protection of Informal Land Rights Act*, 31, 1996.

they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The Parties confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries.⁵²¹

This article of the agreement clearly corresponds with the international legal obligation to recognize right to return to one's "home of origin." Furthermore, the agreement reaffirmed the right to have one's property "restored" or, if this was impossible, to receive compensation for that property. In addition, the agreement provided that the return of the refugee is an urgent matter and an "important objective of the settlement of the conflict."⁵²² This provision in the agreement came at a time in which elements within the conflict parties were against the notion of return of other ethnic/religious groups.⁵²³ Against this background, the agreement incorporated further provisions to guarantee that the return will not be disrupted by any of the parties. These guarantees were not in simple promise or agreement, but in the incorporation of measures which included the "repeal of domestic legislation and administrative practices with discriminatory intent or effect;"⁵²⁴ prevention of incitement;⁵²⁵ the protection of minorities;⁵²⁶ and the "prosecution, dismissal or transfer" of persons in official positions "responsible for serious violations of the basic rights of persons belonging to ethnic or minority groups."⁵²⁷

Furthermore, restitution of property was an important part in the transition. The Dayton Peace Agreement stated that those displaced by the conflict "shall have the right to have restored to them property of which they were deprived in the course of hostilities

⁵²¹ "Dayton Peace Agreement, General Framework Agreement for Peace in Bosnia and Herzegovina" (Paris, November 21, 1995), Annex 7, Chapter 1, Article 1.

⁵²² Ibid.

⁵²³ Williams, "The Contemporary Right to Property Restitution in the Context of Transitional Justice," 37.

⁵²⁴ "Dayton Peace Agreement, General Framework Agreement for Peace in Bosnia and Herzegovina", Annex 7, Article 3(a).

⁵²⁵ Ibid., Annex 7, Article 3(b)&(c).

⁵²⁶ Ibid. Annex 7, Article 3(d).

⁵²⁷ Ibid., Annex 7, Article 3(e).

since 1991 and to be compensated for any property that cannot be restored to them.”⁵²⁸ Williams argues that the Bosnian example is the “first of successfully implemented mass restitution in the wake of full-blown conflict.”⁵²⁹ In the Bosnian restitution experience, the international community continued to exercise pressure for repealing laws and regulations that made restitution claims unsuccessful.⁵³⁰ While at the earlier stages of the Bosnian transition restitution was linked to return, this fact changed over time to the effect that restitution and return became two separate issues.⁵³¹ Within a decade from the end of the war, the Bosnian authorities managed to process more than two hundred thousand successful restitution claims.⁵³²

Moreover, the international pressure also resulted in the vetting of a number of officials claimed to be obstructing the legal reform.⁵³³ Special attention was given to reforming the judicial system by vetting judges, encouraging the appointment of a more ethnically representative judicial body and by making the judicial authority not accountable to the executive authority, but rather more independent as an authority in itself.⁵³⁴ In addition, the police system, which participated in ethnic cleansing during the war, went through a reform and vetting process by force of the peace agreement itself and administered by the UN.⁵³⁵ Despite the imperfections of the Bosnian transitional

⁵²⁸ Ibid., Annex 7, Chapter 1, Article 1.

⁵²⁹ Williams, “The Contemporary Right to Property Restitution in the Context of Transitional Justice,” 33.

⁵³⁰ Ibid., 37.

⁵³¹ Hilal, *Transitional Justice Responses to Palestinian Dispossession*, 10; Rhodri C. Williams, “Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice,” *New York University Journal of International Law and Politics* 37 (2005 2004): 543–4.

⁵³² Rhodri C. Williams, “Protection in the Past Tense: Restitution at the Juncture of Humanitarian Response to Displacement and Transitional Justice,” in *Transitional Justice and Displacement*, ed. Roger Duthie, Advancing Transitional Justice 5 (Social Science Research Council, 2012), 91; Megan Bradley, *The Conditions of Just Return: State Responsibility and Restitution for Refugees*, RSC Working Paper, Working Paper Series (Oxford: Refugees Studies Centre, Oxford Department of International Development, University of Oxford, March 2005), 22.

⁵³³ Williams, “The Contemporary Right to Property Restitution in the Context of Transitional Justice,” 38.

⁵³⁴ Marina Caparini, “Ensuring Long-Term Protection: Justice-Sensitive Security Sector Reform and Displacement,” in *Transitional Justice and Displacement*, ed. Roger Duthie, Advancing Transitional Justice 5 (Social Science Research Council, 2012), 307–9.

⁵³⁵ Alexander Mayer-Rieckh, “Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor’s Offices in Bosnia and Herzegovina,” in *Justice as Prevention: Vetting Public Employees in*

justice experience in terms of its address of the displaced persons issue, this experience demonstrates how international law goes hand-in-hand with the quest for peace.

The pattern detected by the examples above shows that the practice of countries seeking to start a transitional justice process concerning displacement follows certain parameters. First, the right of every displaced person to return to his home of origin is always guaranteed and encouraged. In fact, the whole transitional justice process on the issue of refugees is about advancing justice in reference to human rights norms. Duthie argues that the most significant contribution that “transitional justice can make to resolving displacement is facilitating the integration or reintegration of displaced persons.”⁵³⁶ This conclusion is consistent with the general theory of transitional justice which works to promote measures that aim at redressing the victims of human rights violations.⁵³⁷ Secondly, while restitution of property, and especially real estate, is practiced widely as a preferred remedy, compensation is subject to the financial constraints that will dictate being creative about reparations and substituting a full dry legal conception of reparation with general programs that address the different needs of individuals as well as the society as a whole. This is especially true in cases where displacement was widespread. Finally, what seems to be the non-negotiable side of transitional justice are the measures that aim at ensuring non-repetition. Every state that walks the walk of transitional justice is expected to repeal discriminatory laws and introduce constitutional, legislative or administrative guarantees that ensure that what happened in the past would not happen again. The justice process would be rendered meaningless should it not change the circumstances that led to the same human rights violation it is trying to redress. The case studies presented above demonstrate that these are the pillars of reparation in a transitional justice process that tries to redress the displaced persons.

Transitional Societies, ed. Alexander Mayer-Rieckh and Pablo de Greiff (Social Science Research Council, 2008), 185.

⁵³⁶ Duthie, “Incorporating Transitional Justice into the Response to Displacement,” 23.

⁵³⁷ See discussion on defining transitional justice, sec. 5.3.1 above.

Hence, the theoretical and practical examination of the implications of transitional justice on the right of return lead to the conclusion that there is no justification to assume that this framework is not “corrective or compensatory” as Peled and Rouhana suggest.⁵³⁸ Nor can one find any evidence to propose that there is a separation between the right of return in principle and the means to achieve this right in practice. On the contrary, transitional justice is about redressing human rights violations.

Furthermore, what would the recognition of the right of return mean if it was not coupled with strong policies that guarantee the non-repetition of the crime of forced displacement and redress the victims? As seen in the examples above, the transitional justice approach meant changing the legal system by introducing new constitutions, statutes, policies and programs that guarantee the exercise of one’s rights. In other words, the previously confiscated rights of the victims dictate the parameters of the transitional justice process.

As argued in Chapters 2 and 3, forced displacement in Palestine/ Israel has been the product of an ideological inclination to change the demographic fabric of Palestine/Israel translated into laws and military orders that inflicted and cemented displacement. The effective application of the right to return is, therefore, an essential requisite to end an era of racial discrimination and ethnic cleansing and to finally open a new page in the history of the Palestinians and the Israelis based on equality rather than racial segregation. Unfortunately, one is reminded that under the current political circumstances and power balance, it seems to be impossible to implement the right of those who were displaced from what became Israel in 1948 to return. Regardless of this political fact, the transitional justice framework does not offer alternative solutions that take into consideration the ethnic composition of any state.

Hence, the transitional justice framework suggests that the issue of forced displacement can be redressed through a comprehensive approach that is based on Israel assuming its responsibility. A transition will only be meaningful when Israel, first, adopts the principle of equality in its legal system, repeals all laws that inflict displacement and

⁵³⁸ Peled and Rouhana, “Transitional Justice and the Right of Return of the Palestinian Refugees,” 144.

other forms of discrimination and recognizes the applicability of international human rights law and international humanitarian law on every territory under its jurisdiction. Reparations will become possible only when the Israeli legal system is reformed.

In the case that a Palestinian state becomes free of occupation, this state will also have to carry some of the burdens of the transition, especially with return and restitution. Furthermore, it will be the obligation of this state to also ensure that no discriminatory laws are applicable in its territory, and to reform the legal system in a way that would allow for a successful property restitution program to take place. It will be the Palestinian responsibility to have an effective judicial and administrative regime that would be able to redistribute land in a fair way that would not violate the rights of either the displaced persons or the secondary occupants.

5.4 Conclusion

This chapter has first reviewed the way the Palestinian refugees and displaced persons' plight was addressed in the Palestinian-Israeli peace process framework and found that this process has not provided remedies to any of the victims of displacement, whether those who were displaced from Israel or the OPT. While the Oslo framework has postponed the issue of the 1948 refugees, it also has not given immediate remedies to any of the other refugees or displaced persons. As shown above, the "admission" of those who were displaced during the 1967 war and the repatriation of those whose residencies was revoked was blocked by Israel.

Then, the present chapter turned into defining the framework that governs the consequences of a wrongful act in international law. This framework includes the law of state responsibility which stipulates that a state is obliged to reverse its illegal conduct by providing restitution, compensation and satisfaction. These three elements of reparation need to be provided in a meaningful way that would redress the victims. Furthermore, in cases of war crimes, crimes against humanity or genocide, there is a legal obligation to prosecute those responsible for those crimes.

Against this background, this chapter then turned to examining the appropriate transitional justice measures that can meaningfully redress the victims of Israel's forced

displacement policy. It did so by first defining the transitional justice framework as well as introducing its features, principles, measures and goals. The main goal of the transitional justice framework is to promote durable peace through the advancement of justice. The conception of justice on which this framework is built is based on international human rights law and international humanitarian law. Hence, the mission of transitional justice is to promote comprehensive remedies that would meaningfully redress the victims of gross human rights violations.

The four main categories of the transitional justice framework, namely, truth, accountability, reparations and legal and institutional reform were then examined in theory and practice. The analysis of the practice in each of the remedies focused on examples of states that used the transitional justice framework to redress victims of displacement. Important lessons were drawn in relation to the parameters governing the reference to transitional justice in each of the categories of remedies.

In terms of truth commissions, it was found that there are countries that have articulated their forced displacement problems with truth commissions. These commissions sought to bring about a comprehensive understanding related to the gross human rights violations that took place during the conflict or suppressive regime. In most cases, the commissions represented a forum for victims as well as perpetrators in order to help the entire society to come to terms with the legacies of the past. However, this was not the only contribution that truth commissions expected to make. Each commission was charged with suggesting appropriate measures to redress the victims and to prevent the repetition of the violations in the future, which was an important tangible outcome of the truth seeking process. Hence, while truth itself is a remedy, it does not suffice alone to redress the victims, but rather needs to be followed up by a comprehensive program of remedies that can meaningfully repair the harm caused by the human rights violations. This means that truth commissions, as part of the transitional justice framework, are not aimed at providing lip service to the victims but rather to promote their rights in a meaningful and comprehensive way.

In addition to truth seeking, transitional justice is concerned with the accountability of human rights violations perpetrators. Two schools of thought have debated the question

of accountability: The restorative justice school preferred reparation over punishment, while the retributive justice school saw that justice cannot be established without the prosecution of perpetrators of mass human rights violations. According to the principles of individual criminal responsibility, states have the obligation to prosecute perpetrators of gross human rights violations. However, a number of countries have preferred to follow a restorative justice model and give amnesty to perpetrators of human rights violations. Other countries have developed their legal systems to allow the prosecutions of performers of war crimes, crimes against humanity and genocide and prosecuted persons responsible for the crime of forced displacement. They even applied the criminal law for this crime retrospectively, and prosecuted persons who were responsible of the crime of forced displacement since as far back as 1949, as the Estonian experience provides. Similarly, all international courts and tribunals since the Second World War have condemned the crime of forced displacement, and in the case of Former Yugoslavia several alleged criminals were prosecuted for this crime. In the case of Palestine, there has been a complete impunity enjoyed by the perpetrators of war crimes and crimes against humanity. However, its recent acceptance as a non-member observer state at the UN might change this situation, although until the current day political interventions have blocked this path. In the case of a genuine transition to peace, Israel and Palestine will face the question of accountability and will be required to develop policies to articulate it. The transitional justice framework would suggest that sweeping the issue of accountability under the carpet will not bring about the justice and peace sought by both nations.

Finally, this chapter has studied what a comprehensive program of reparations for displaced persons entails and found that such a program must incorporate a combination of repatriation, property restitution and compensation. Furthermore, for these reparations to be effective there is a need for a comprehensive legal and institutional reform within Israel/ Palestine. As shown above, countries that introduced reparations to the victims could not do so without a comprehensive reform of their legal systems, administrative structures and judiciaries. South Africa introduced its land restitution program through its transitional constitution and developed further program to redistribute land and end the era of racial segregation that the apartheid regime had kept

with its discriminatory legal system. Similarly, Bosnia had to change its legislations and vet officials who might block the return of the refugees for such repatriation to take effect. Similarly, Colombia adopted a law that reaffirms the right of the refugees to return and developed a system to provide reparations for the victims. Another example is Liberia who guaranteed the return of its IDPs to their homes by virtue of an official declaration. In Timor-Leste, the state restored lands to those who were displaced. Hence, it can be concluded that a transitional justice process cannot meaningfully redress the victims of forced displacement unless it guarantees their right to return and property restitution, and provides appropriate other reparations. Equally importantly, an essential part of the reparation process is that a state reforms its legal system to guarantee the non-repetition of the crime and the redress of the victims.

In the context of the Palestinian-Israeli conflict, forced displacement has been part of the legal system itself. The victims of forced displacement are continuously increasing as a result of their being subject to discriminatory laws that were designed to deport or transfer them. Hence, the demand for reparations for the victims of displacement of the 1948 and 1967 wars refugees should be coupled with a demand to introduce deep legal and institutional reforms. The Oslo peace process framework has not only failed to bring about peace, but has also failed to provide remedies for the victims of forced displacement. Moreover, it has ignored important issues like institutional reform, which led to an accelerating rate of displacement. The transitional justice framework in South Africa, for example, was not only about providing reparations to the victims of apartheid, but also about ending the apartheid regime and opening a new page in the history of South Africa where no racial discrimination is accepted. Among the most significant establishments of the transitional justice process in South Africa is the incorporation of the principle of equality into its constitution. Unless this principle is adopted by Israel/Palestine, any attempt to bring about peace, not to mention justice, will be meaningless. This is what a transitional justice framework entails.

General Conclusions

Since the early stages of the Palestinian-Israeli conflict, Israel has consistently inflicted intentional forced displacement on Palestinian communities and individuals, resulting in the displacement of more than 66% of the Palestinian population.¹ As shown in Chapters 2 and 3, these displacements have taken place through a variety of methods that were designed and implemented by Israel's army and legal system. During the wars of 1948 and 1967, Israel's war operations displaced hundreds of thousands of Palestinians and turned them into refugees and IDPs. Historical research based on Israeli archives as well as testimonies of the victims and previous Israeli soldiers demonstrates that the displacements that took place during the wars were intentional. The goal of these forced displacements was to thin out, as much as possible, the Palestinian population in order to tilt the demographic balance in areas under Israeli control in favour of a Jewish majority. After each of the two wars, Israel cemented its displacements through a number of regulatory measures that had the effect of excluding the displaced persons from enjoying the legal status that would allow them to reside in their homes. Furthermore, the refugees were prevented from returning to their homes by "prevention of infiltration" laws and military orders that criminalized any attempted unauthorized return of the victims of displacement.

Moreover, the Israeli legal system has been actively innovating a series of laws, policies and measures that continue to inflict more and more displacements throughout the years. These measures include the revocation of residency status, the denial of family unification and child registration based on discriminatory criteria and the freezing of the Palestinian population registry in such a harmful way that has resulted in a large number of additional forced displacements. The regulatory regime of displacement is designed to exercise further control on the Palestinian population in order to thin out the number of non-Jews under Israeli jurisdiction and control. All the policies that were examined within the scope of this study are discriminatory: they only harmed Palestinians. When it comes

¹ Badil, Resource Center for Palestinian Residency and Refugee Rights, *Survey of Palestinian Refugees and Internally Displaced Persons 2010-2012* (Beithlehem: BADIL, 2012), xvii.

to the right to reside and immigrate, Israel adopts separate legal frameworks that distinguish Jews from non-Jews. Any Jew in the world is entitled to Israeli citizenship under the *Law of Return* and the *Nationality Law*,² and Jews do not need any special permit to live in Israeli colonies in the West Bank. Furthermore, while Palestinian family unification and child registration are extremely limited by the regulatory restrictions developed by Israeli state institutions, Jewish families enjoy full protection and respect under a legal framework that recognizes the right of every Jew and family member of a Jew to immigrate to Israel and choose his preferred place of residence.

As shown in Chapter 4, Israel's systematic policies of forced displacement are contrary to international law. First, they are contrary to international human rights law which guarantees one's right to "return" or to "enter" his country, and prohibits racial discrimination. Secondly, these policies violate international humanitarian law which stipulates that a state must refrain from deporting or transferring any civilian population in the context of armed conflict or occupation. Furthermore, international humanitarian law forbids an occupying power from changing the laws in an occupied territory in a way that would violate the basic rights of the population. By introducing a legal system that excludes hundreds of thousands of Palestinians in the OPT from the right to reside in their homes, Israel has violated the protection provided by international humanitarian law to the Palestinian population. Thirdly, Israel has violated the customs that regulate nationality in situations of state succession. In a situation where a state succeeds another, the successor state is obliged to grant habitual residents within its jurisdiction its nationality. By legislating a citizenship law that excluded all those who were displaced during the 1948 war from its citizenship, Israel actively violated its obligation to recognize their status as its citizens. Finally, forced displacement has been consistently condemned as a war crime and a crime against humanity since the aftermath of the Second World War. It is a war crime if conducted in the context of an armed conflict or an occupation,

² *The Law of Return, 5710-1950, Published in Sefer Ha-Chukkim No. 51 of the 21st Tammuz, 5710 (5th July, 1950), p. 159, 1950, Translation provided at the website of the Israel Ministry of Foreign Affairs, available at: http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Law%20of%20Return%205710-1950; *Nationality Law, 5712-1952, Published in Sefer Ha-Chukkim No. 95 of the 13th Nisan, 5712 (8th April, 1952), P. 146, 1952.**

and a crime against humanity when committed in a widespread or systematic manner. The legal regime of displacement reflects a systematic manner of committing this crime; and the fact that the majority of the Palestinian population has been permanently displaced by Israel indicates that Israel's policy is widespread. Hence, the perpetrators of this crime are individually liable for it and the state of Israel is responsible to redress the victims.

Despite the fact that displacement has been on-going since 1948, no remedies have been provided to the victims thus far. Unfortunately, the "peace process" framework which was initially launched in a peace agreement between Egypt and Israel in the late 1970s, and later joined by the PLO and Jordan, has failed to provide any solutions to the displaced persons until the current day. First, the "peace process" framework has postponed the negotiation on the 1948 refugees issue to the final status negotiations. Israel's position on this issue is that it will not accept responsibility on the 1948 exodus and will not allow the refugees to return. Secondly, the bilateral agreements between Israel and Egypt, Jordan and the PLO provided that the "admission" of the "displaced persons" of the 1967 war would be resolved by negotiations in the context of a "continuing committee," the decisions of which were blocked by Israeli negotiators. Furthermore, the destiny of those whose residencies were revoked was also blocked by Israeli negotiators. In addition, the peace process failed to address other methods of displacement, as well as important questions related to the displacement issue including truth, accountability of the perpetrators of gross human rights violations, legal and institutional reform, and comprehensive reparations. What made the problem even worse is that Israel developed new ways and patterns of displacement since the beginning of the peace process. On a daily basis, there are new victims added to the long list of Palestinian refugees and IDPs.

In light of this dilemma, contributors from different schools of thought have advanced proposals to solve certain aspects of the displacement issue. Advocates of the rights-based approach presented their arguments with a methodology strictly representing the parameters of international law. By referring to the rules of state responsibility, as well as other general principles of international law, the contributors of

the rights based approach have advocated for a strict implementation of the right to return, restitution and compensation.

In contrast with this approach, a “realistic” approach contributed to the discussion by using arguments that echo the utilitarian theoretical framework. In light of the great imbalance of power and the suffering of the Palestinian people in general and the refugees and displaced persons in particular, and with the prospect of the potential emergence of a Palestinian state as a result of the “peace process” framework, the advocates of this approach called for forfeiting the Palestinian claim on the right of return. This conclusion was reached by weighing the options available in light of the political situation and suggesting a possible political answer. In light of Israel’s stress on preserving a Jewish majority, the supporters of the realistic approach saw that it would be better to achieve fewer rights than what international law stipulates in a possible peace than no rights at all in an impossible peace. Hence, this school does not claim any links to justice theories but rather bases its conclusions on philosophical, moral and practical reasons.

In the context of the same dilemma, a new stream of literature has emerged while the transitional justice framework was gaining universal recognition, questioning whether transitional justice can be implemented in the Palestinian-Israeli conflict. Part of this stream focused on truth and reconciliation commissions, and suggested that such commission could help with redressing the Palestinian refugee problem. Some of the contributors in this approach also suggested separating between Israel’s recognition of the right of return and the implementation of this right, but still framed it under the umbrella of transitional justice. Since the transitional justice discourse is still in its “infancy,”³ as Dumper noted, the Palestinian-Israeli literature has not yet developed a frame of reference to parameters in the transitional justice framework. The gap between this stream and the rights based approach raises questions on the relationship between transitional justice and international law; and, consequently, on its position among other approaches and frameworks attempting to offer solutions to the problem.

³ Michael Dumper, *The Future for Palestinian Refugees: Toward Equity and Peace* (United States of America: Lynne Rienner Publishers, 2007), 185.

This thesis has been designed to address these questions by defining the parameters of a transitional justice approach in the context of the transitional justice theory and practice. It did so by applying a transitional justice methodology, which requires a comprehensive approach in understanding the human rights violations and in examining appropriate remedies. Furthermore, this framework's conception of justice is based on international law. Hence, this thesis used the standards of international human rights law; international humanitarian law; international refugee law; and international criminal law as its terms of reference.

Chapter 5 explored the main concepts of the transitional justice framework and then examined examples that represent the restorative and retributive justice approaches focusing on their responses to the crime of displacement. This discussion reaffirmed that the conception of justice to which the transitional justice framework refers is based on international law. Transitional justice aims at redressing the legacies of mass human rights violations through reinforcing these rights and creating mechanisms for them to be practiced. Furthermore, the transitional justice framework's responses to the issue of forcible displacement have incorporated a full range of remedies including truth commissions, criminal prosecutions of the perpetrators, reparation to the victims and institutional and legal reforms.

Among these remedies, the question of truth is an understudied topic in the context of the Palestinian-Israeli conflict in general, and the displacement problem in particular. Furthermore, as mentioned above, it has never been addressed in the context of the "peace process." Hence, a clear understanding of the truth is vital when it comes to forcible displacement and dispossession because these are the core issues of the Palestinian-Israeli conflict, at least from the victims' point of view. The Palestinian collective memory refers to the mass exodus that took place in the 1948 war as the *Nakba* (the Catastrophe) and to the contemporary systematic and widespread displacements as the *Continuous Nakba*. While these "catastrophes," as seen from the victims' perspective, are still denied by Israel until the current day, truth commissions have the potential of providing an answer.

Truth commissions are usually designed to end the patterns of denial that are coupled with a systematic violation of human rights. As shown in Chapter 5, the mandates of truth commissions usually require them to dig deep into the human rights violations, in an attempt to reach an understanding of their nature, why they took place, whether they were systematic or isolated incidents and who was responsible for them. Truth commissions seek to help the society to achieve closure with its past by advancing truth and acknowledgment. In other words, they are tools for providing satisfaction and advancing reconciliation. Moreover, these commissions are usually designed to recommend further reparations to redress the victims and guarantee non-repetition of the atrocities. Truth commissions in Sierra Leone, Liberia and Timor-Leste have examined policies of forced displacement and acknowledged responsibility over the suffering of the victims. Furthermore, these commissions suggested reparations and policies so that their governments would redress the victims of displacement.

In the Palestinian-Israeli context, the work of several historians in the past and the stream of “new historians” in Israel has revealed the great amount of suffering inflicted upon those who were forcibly displaced and the methods in which they were deported or transferred. Similarly, the work of the contemporary civil society and academics, to monitor, document, report and resist the Israeli physical and regulatory measures that inflict further displacement and dispossession have exposed these policies to the world. All those who closely monitor the policies that Israel has designed since 1948 until now understand that their aim is to alter the ethnic and religious demographic balance in Israel and in the OPT to tilt in favour of maintaining a Jewish majority. This “truth” is out there, well documented and even published in the form of discriminatory laws that are part of the Israeli regime of displacement. In fact, Israel’s declassification of parts of its own archives and enactment of a Freedom of Information Act have allowed academics and civil society to know parts of the secret unpublished information, including regulations, procedures and numbers of victims. All of this information is certainly useful for a transitional justice process. However, as explained in Chapter 5, only knowledge is not sufficient to establish truth, but it must also be combined with acknowledgment. Truth

commissions in other countries show that acknowledgment is a key element of reparation.

But once an acknowledgment has been established, redressing the victims becomes imperative in the transitional justice framework. This redress takes place in the form of addressing the question of individual criminal responsibility, providing reparations to the victims and introducing legal and institutional reforms that would guarantee non-repetition.

Since forced displacement is considered a war crime and a crime against humanity, the perpetrators are individually responsible for their crimes and an obligation to prosecute them exists in international law. Many persons in public offices in Israel seem to be criminally liable to committing the crime of “deportation” or “forcible transfer of civilian population.” It was shown in Chapter 5 that the theories and practices of transitional justice suggest that there are two ways to deal with such alleged criminals: prosecution or pardon. In the case of prosecution, there are three options: *ad hoc* criminal tribunals similar to the ICTY, national prosecutions like the system developed by Colombia or by reference to the ICC.

Of course, all these options would depend on political circumstances. In November 2012, the PLO finally managed to get recognition from the UN General Assembly as a non-member observer state in the UN. This status might enable it to become a member of the Rome Statute, giving the ICC jurisdiction on any crime Israel commits in the OPT. At the same time, the ICC might also gain jurisdiction based on a declaration to accept the jurisdiction of the ICC that was deposited by the Palestinian Authority in 2009. The application of measures of international criminal justice has been obstructed by political factors and there is pressure on the PLO to refrain from requesting the jurisdiction of the ICC.

The other policy option is amnesty or a combination of prosecutions and amnesties. This option is favourable to some transitional countries especially when they reach the transition through negotiations. Usually, when amnesty is considered, the transitional states frame it so as to make it clear that this is not equal to impunity. The main element that is required to make such distinction is the perpetrator’s

acknowledgment of wrongdoing and the requesting of a pardon. A combination of both amnesties and prosecutions can be ideal in countries where the number of those who are involved in the violation is large. Israel certainly falls under this category as shown in Chapters 2 and 3. In most models where pardon is granted, an obligation to tell the truth and acknowledge responsibility is usually practiced and is seen as part of the closure with the legacy of the past.

In all cases, and regardless of whether past displacements will be prosecuted, it is essential, and stipulated by international law, that the Palestinian and Israeli domestic legal systems condemn forced displacement as a crime. This is likely to have the effect of bringing about the end of a long standing systematic policy of displacement. As long as displacement is part of the law, not against it, the crime of forced displacement will not stop.

The third remedy is promoted by the transitional justice framework is reparations. This form of redress is subject to the consensus of all schools of transitional justice. While there have been differences between the schools of restorative and retributive justice on whether the perpetrators of mass human rights violations should be punished or pardoned, and whether truth commissions interrupt criminal justice or support it, there is consensus that redressing the legacies of the past and applying policies that guarantee non-repetition are necessary.

As practiced in other countries in transition, a reparation program for displaced persons in Palestine must include durable solutions with its three elements of return, resettlement or integration in the countries of refuge. The right to return to one's home of origin has been guaranteed and practiced widely among countries that sought to redress the victims within the transitional justice framework. Such return applies to both refugees and internally displaced persons, regardless of whether they actually continue to have a refugee status or not. Israel and Palestine, only if Palestine gains independence or sufficient effective control over a territory, then the Palestinian authorities too have the obligation to allow all those who were displaced from their territory to return to their homes of origin. This right entails restoring their lost status that would allow them to be treated equally as their neighbours, including Israeli and Palestinian citizenships (if

Palestine succeeds to act as a state). Similarly, a person who was displaced from Jerusalem to the West Bank and from the West Bank to Gaza should be entitled to receive a status that does not discriminate between him and his neighbours in their homes of origin.

What matters, specifically in the Palestinian displacement case, while performing a reparation program is the way to approach the refugees and IDPs and the terminology that should be used. This is why any remedy for the conflict that seeks justice for refugees and IDPs must include a clear acknowledgement of the right of return, since it has become an important element of the Palestinian identity as a whole. Salman Abu Sitta put this notion in the following words: “for all Palestinians, the right of return is sacred. It is built into their psyche.”⁴ As a result, the exercise of this right must be done in a way that acknowledges it as return, contrary to the terminology used in the Camp David and Oslo peace agreements. It is neither simply “admission” nor “reissuance of lost identity cards.” It is the return of a forcibly displaced population. The Palestinians continue to keep the keys of their dispossessed homes in Israel and the OPT. The key of their houses, kept and handed from one generation to another, is known in the Palestinian culture as “the key of return.”

In addition, the right to property restitution is closely linked with return, although it is a separate right. Every person who was dispossessed of his/her property should be able to receive it back regardless of when this dispossession took place. The main problem that will rise in this situation is with limited resources, especially when it comes to rebuilding homes that were demolished. In 1948 alone, Israel demolished more than 500 Palestinian villages to prevent refugees and IDPs from return. An immediate rebuilding of all those villages as well as all the homes that were demolished during the course of the conflict might be impossible. This problem can be addressed by adopting a program of restitution over a number of years as was practiced in several contexts. Another problem will rise when secondary occupants reside in the homes of the refugees or IDPs. For such cases, international law does not provide a clear answer about whose interest would be

⁴ Salman Abu Sitta, “The Right of Return: Legal, Possible, and Sacred,” in *Palestinian Refugees: The Right of Return*, ed. Naseer Aruri (Pluto Press, 2001).

prioritized. What must be respected in such cases, though, is the right of the secondary occupants themselves not to be evicted arbitrarily and to be offered compensation if evicted after due process. The returning refugee or IDP might also accept to be given another property in the vicinity of their original home.⁵ In all cases, as has been seen in several countries adopting the transitional justice approach, the state takes responsibility and designs special policies and programs to redress the victims while protecting the legitimate concerns of the secondary occupant.

In addition to return and restitution, the refugees and IDPs are legally entitled to compensation. Given the large numbers of victims, the transitional justice approach offers alternative general reparations to compensate for their refugeehood and to help them reintegrate into their societies. This might include education, vocational training, agricultural aid and many other forms of benefits that will help those displaced to exercise their return in safety and dignity.

The last, but certainly not less important, remedy for the crime of forcible displacement is the obligation to perform comprehensive reforms in Israel/Palestine that would not only make the return of those displaced possible, but also guarantee the non-repetition of the crime of forced displacement. As shown above, transitional communities usually address the displacement problem by repealing discriminatory laws and regulations, incorporating principles like equality into the legal system and vetting officials who might disrupt the transition or the return. All these measures are of a great priority in the Palestinian-Israeli context. The “peace process” framework has completely overlooked the obligation and need to incorporate the end of a long era of discriminatory laws.

The transitional justice framework follows the parameters of the general principles of international law and expects a state to reform its legal system in order to, as Duthie put it, give force to the human rights norms that had been violated.⁶ This means that Israel has to change its regime on nationality law which gives any Jew around the world

⁵ Michael Lynk, “The Right to Restitution and Compensation in International Law and the Displaced Palestinians,” *Canada’s Periodical on Refugees* 21, no. 2 (2003): 104.

⁶ Roger Duthie, “Transitional Justice and Displacement,” *International Journal of Transitional Justice* 5, no. 2 (July 1, 2011): 243.

the right to become an Israeli citizen and denies most of the native non-Jewish population their right to enjoy such citizenship. This law explicitly excludes all those who were displaced from enjoying such citizenship only on the basis of their racial or religious background. It also denies citizens who were born abroad from registering their children born abroad as citizens of Israel, a regulation that only affects non-Jews because Jews can always claim their citizenship according to the law of return. Similarly, Israel has to reform its *Entry into Israel Law*, which has been used to displace thousands of Jerusalemite Palestinians and to prevent other thousands from registering their children on the basis of noncompliance with the “centre of life” policy, as explained in Chapter 3. While all these policies of persecution were not addressed in the Oslo peace process, they would not be tolerated in a transitional justice process. The concept of justice during times of transition entails that justice is advanced by promoting and enforcing rights.

Similarly, in the process of transitional justice, repealing the legal military regime in the OPT becomes a top priority. Membership in the Palestinian community, whether it becomes an independent state or not, shall become regulated in a way that does not discriminate against those who were displaced. All the laws and regulations of residency status, prevention of infiltration and movement restrictions must be repealed and reformed to allow the refugees and IDPs to enjoy non-discrimination.

Moreover, a transitional justice process entails institutional reform. Public offices that dealt with residency, child registration, family unification, citizenship and the like must undergo a serious institutional reform on the basis of non-discrimination. Equally importantly, there is an urgent need to reform Israel’s judicial system. As explained in Chapters 2 and 3, not only did this judicial system fail to prevent the recurrence of the forcible displacement of the Palestinians or to provide remedies for the victims, but it also actively participated in designing the legal regime according to which forcible displacement was committed. The Israeli judiciary consistently refused to refer to international legal standards in relation to displacement. For example, as shown in Chapter 4, the court denied the applicability of the Fourth Geneva Convention, especially

Article 49,⁷ the implementation of which would have prevented displacement that is referred to in the Convention as a “gross violation.” Furthermore, Israel has never recognized the applicability of international human rights treaties to the OPT. The legal framework that the Israeli Supreme Court adopted only included the 1899 and 1907 Hague Regulations, as well as selected articles from the GCIV, and with the court’s own interpretation of them. A transitional justice process necessarily entails the acceptance of the applicability of human rights norms.

Using this approach to remedies, this thesis has sketched the parameters of a transitional justice framework in repairing forced displacement; showing what types of remedies can be implemented while redressing the victims of Israel’s forced displacement policies. Therefore, the methodological implementation of the transitional justice framework in the current study has offered a contribution to knowledge of its relevance and applicability to the conflict. One of the main factors that led to this contribution is that this research tackled the displacement problem more comprehensively than most of the available literature. This comprehensiveness, as shown in Chapter 1, included two elements: a wide scope of factual examination as well as a holistic approach to discussing appropriate remedies. For example, the understudied relationship between Israel’s *Prevention of Infiltration Law* and military orders was highlighted in this study. In light of this relationship, the most recent amendment to the *Prevention of Infiltration Military Order*⁸ in the West Bank was understood in its context. This regulatory tool was first initiated in the aftermath of the 1948 War as a method to prevent the return of any person who was displaced by the war.⁹ Israel enacted the same law in the form of military orders in the West Bank and Gaza in the aftermath of the 1967 for the same purpose.¹⁰

⁷ HCJ 698/80, Kawasme et al v. The Minister of Defence et al. (1981).

⁸ *Military Order Regarding Prevention of Infiltration (Amendment No. 2) (Judea and Samaria)*(No. 1650) 5769-2009, 2009, An English translation is presented by HaMoked, available at: http://hamokeden.red-id.com/files/2010/112301_eng.pdf.

⁹ *The Prevention of Infiltration (Offences and Jurisdiction) Law, 5714-1954, Sefer Ha-Chukkim No. 16, of the 27th Av, 5714 (26th August, 1954), P. 160, 1954.*

¹⁰ *Military Order Regarding Prevention of Infiltration (West Bank) (No. 106), of 5727, 1967; Military Order Regarding Prevention of Infiltration (West Bank) (No. 125), of 5727, 1967; Military Order Regarding Prevention of Infiltration (West Bank) (Amendment No. 1) (No. 190) of 5782, 1967; Military Commander for the Judea and Samaria, Military Order Regarding Prevention of Infiltration (Judea and Samaria)(No.329),*

Within this context, the latest amendment of the “Prevention of Infiltration” as a displacement tool can be accurately understood. Similarly, the pattern of de-nationalizing Palestinians in Israel and revoking residencies from Palestinians in the OPT shows a consistent systematic trend of excluding as many Palestinians as possible from the permit that allows them to enjoy residency rights in their homes. Furthermore, when Israel’s continuous contemporary displacements are put in the context of the findings of the “new historians” in Israel who exposed the ideological motives behind “transfer,” a better understanding to the problem can be achieved. By widening the scope of factual examination, the current study has avoided the major shortcoming of the rights-based approach which is, as expressed by Zreik, “renunciation of the frame, the historical context.”¹¹ The macro picture that has been sketched in Chapters 2 and 3 shows how systematic and widespread Israel’s practice of displacement is.

The other element of comprehensiveness that this study has followed is related to remedies. As shown earlier, the transitional justice framework promotes a holistic approach to redressing the victims of gross human rights violations. The current thesis has shown that only through a combination of appropriate measures to addressing displacement as a crime can the redress of displaced persons be meaningful. This study has addressed the lack of literature that learns from international experiences of displacement¹² by examining the transitional justice responses to displacement in South Africa, Sierra Leone, Liberia, Colombia, Timor-Leste, Estonia and Bosnia and Herzegovina.

Finally, it should be noted that attempts to transfer the failures of the Oslo peace framework into a transitional justice approach will be counterproductive. While transitional justice is a multi-disciplinary field that incorporates contributions from legal, political, psychosocial and other fields of knowledge; it should be remembered that this

5729, 1969, English Translation is presented by HaMoked, available at:

http://www.hamoked.org/files/2010/112300_eng.pdf; *Military Order Regarding Prevention of Infiltration (Gaza Strip and Northern Sinai) (No. 82) for 5727, 1967*; *Military Order Regarding Prevention of Infiltration (Gaza Strip and Northern Sinai) (No. 290) for 5729, 1969*.

¹¹ Raef Zreik, “Palestine, Apartheid and the Rights Discourse,” *Journal of Palestine Studies* 34, no. 1 (October 1, 2004): 78.

¹² Michael Dumper, *Palestinian Refugee Repatriation: Global Perspectives* (Oxfordshire: Routledge, 2006), 8; Dumper, *The Future for Palestinian Refugees: Toward Equity and Peace*, 185.

field is first and foremost based on justice. Hence, compromising the element of justice in this field will render its use meaningless. At the same time, transitional justice responses to human rights violations are not based on a one-size-fit-all approach. Each conflict or suppressive regime needs special attention to the rights of all stakeholders, and as such will need a carefully crafted transitional justice process. In the Palestinian-Israeli context, a transitional justice approach will certainly have to take into account the rights, interests and duties of Palestinians and Israelis who have been divided by conflict. A comprehensive transitional justice approach will not only address displacement and other violations committed by Israeli perpetrators, but will also include Palestinian violations as well. It is a victim-centered approach, and it focuses on the whole scope of atrocities regardless of who perpetrated them or who was the victim. Hence, it should not be feared that a transitional justice framework which recognizes the Palestinian right to equality and return would compromise the rights of the Jewish population. On the contrary, this framework aims at advancing reconciliation by cementing everyone's rights in legal responses that attempt to guarantee justice for all.

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